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Nos. 99-603, 99-960

IN THE

Supreme Court of the United States

LEGAL SERVICES CORPORATION,

Petitioner,

-and-

UNITED STATES OF AMERICA,

Petitioner,

v.

CARMEN VELAZQUEZ, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Did Congress violate the First Amendment and fundamental principles of separation of powers by authorizing lawyers receiving federal funds from the Legal Services Corporation to represent individuals and families seeking welfare benefits in court while barring those lawyers from challenging, on their clients' behalf, welfare statutes or regulations as unconstitutional or contrary to applicable statutes?

2. Did the Legal Services Corporation violate the First Amendment by requiring that any entity that receives funds from the Legal Services Corporation and that desires to use non-federal funds to permit lawyers to advance otherwise forbidden legal arguments must establish a wasteful and expensive physically separate facility to house the non-federally funded lawyers?

3. Does the text of the Legal Services Corporation Act of 1974, when read harmoniously with the 1996 appropriations rider at issue herein, authorize federally funded Legal Services lawyers to advance otherwise forbidden legal arguments when it is necessary to do so to prevent the possible commission of an ethical violation?

PARTIES TO THE PROCEEDING

Three sets of litigants were party to this case in the courts below: the plaintiffs, the defendant Legal Services Corporation, and the intervenor-defendant United States. The plaintiffs consist of the following persons and not-for-profit corporations: Carmen Velazquez; Elisabeth Benjamin; Andrew J. Connick; Peggy Earisman; C. Virginia Fields; Guillermo Linares; Stanley Michels; Adam Clayton Powell, IV; Lawrence Seabrook; Lauren Shapiro; Olive Karen Stamm; Scott M. Stringer; Jeanette Zelhof; Centro Independiente de Trabajadores Agricolas, Inc.; Community Service Society of New York, Inc.; Farmworkers Legal Services of New York, Inc.; Greater New York Labor-Religion Coalition; New York City Coalition to End Lead Poisoning; and WEP Workers Together. All of the aforementioned plaintiffs support the judgment below. Two former plaintiffs, Lucy A. Billings and Jill Ann Boskey, are no longer parties to the proceedings. Ms. Billings has become a New York State judge. Ms. Boskey is deceased.

Legal Services of New York, the umbrella entity that receives and disburses funds from the Legal Services Corporation to local providers in the New York City area, has taken no position in this litigation.

STATEMENT PURSUANT TO RULE 29.6

None of the corporate respondents have parent companies, nor is ten percent or more of the stock of any of them owned by any publicly held company.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	vi
Table of Appendices	xvii
Constitutional Provisions, Statutes, and Regulations Involved	1
Statement of the Case	1
Summary of Argument	6
Argument	10
I. Congress's Effort To Authorize Federally Funded Legal Services Lawyers To Represent Indigent Clients Seeking Welfare Benefits Under "Existing Law" But To Forbid The Lawyers From Advancing Any Argument That Would "Amend Or Otherwise Challenge Existing Law" Violates The First Amendment	10

Contents

Page

A. Congress May Never Allocate Speech Subsidies to Shield the Government's Viewpoint From Challenge 12

B. Congress May Not Forbid a Subsidized Lawyer from Advancing Otherwise Appropriate Legal Arguments on Behalf of an Indigent Client 14

C. Petitioners' Efforts to Invoke *Rust v. Sullivan* to Avoid the Force of Respondents' First Amendment Objections Are Unavailing 17

1. Congress's Ban on Challenging the Legal *Status Quo* Cannot be Defended as a Decision to Offer Differing Categories of Legal Service 22

2. Petitioners' Assertion That Congress's Restriction Does Not Materially Interfere With Free Speech Misidentifies Both the Primary Speaker and the Relevant Audience 27

3. Congress's Restriction Does Not Merely Deflect Indigent Clients to Other Lawyers Who Are Free to Raise the Forbidden Arguments .. 30

Contents

Page

II. Petitioners Have Unconstitutionally Interfered With The Use Of Non-Federal Funds To Advance "Prohibited" Legal Arguments On Behalf Of Indigent Clients 33

A. Congress Has Flatly Banned the Use of Non-Federal Funds to Advance Forbidden Legal Arguments in Welfare Cases 34

B. LSC Has Placed Unconstitutionally Onerous Conditions on the Use of Non-Federal Funds 38

III. Congress May Not Interfere With The Decisional Autonomy Of The Judiciary By Preventing Legal Services Lawyers From Advancing Disfavored Legal Arguments .. 45

IV. The Text Of The 1974 LSC Act Should Be Read Harmoniously With The 1996 Appropriations Rider To Permit A Legal Services Lawyer To Advance Forbidden Arguments When Necessary To Avoid The Possible Commission Of An Ethical Violation 48

Conclusion 50

TABLE OF CITED AUTHORITIES

Page

Cases:

Argersinger v. Hamlin, 407 U.S. 25 (1972) 29

Arkansas Educ. Television v. Forbes, 523 U.S. 666 (1998) 11, 13, 14, 28

Ashwander v. TVA, 297 U.S. 288 (1936) 24

Baylor v. New Jersey Dep't of Human Servs., 561 A.2d 618 (N.J. App. Div. 1989) 26

Board of Regents of Univ. of Wisc. v. Southworth, 120 S. Ct. 1346 (2000) ..... *passim*

Boy Scouts of Am. v. Dale, 2000 WL 826941 (U.S. June 28, 2000) 15

Brooklyn Inst. of Arts & Sciences v. City of New York, 64 F. Supp. 2d 184 (E.D.N.Y. 1999) 19

Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1977) 15

Buckley v. American Constitutional Law Found., 525 U.S. 182 (1999) 27

Buckley v. Valeo, 424 U.S. 1 (1976) 23, 38

California Democratic Party v. Jones, 2000 WL 807188 (U.S. June 26, 2000) 15, 30

Cited Authorities

Page

Cammarano v. United States, 358 U.S. 498 (1959) 10

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) 10, 42

Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) 37

Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981) 38

City of Boerne v. Flores, 521 U.S. 507 (1997) 46

City of Chicago v. Morales, 527 U.S. 41 (1999) .. 44

City of Ladue v. Gilleo, 512 U.S. 43 (1994) 43

City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988) 22, 27, 44

Civetti v. Commissioner of Pub. Welfare, 467 N.E.2d 101 (Mass. 1984) 27

Civil Rights Cases, 109 U.S. 3 (1883) 32

Colorado. Repub. Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996) 45

Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985) 28

Cited Authorities

Page

Dickerson v. United States, 2000 WL 807223 (U.S. June 26, 2000) 9, 46, 47

Dugas v. Hoffpauir, Civ. Action No. 6:93-1699 (W.D. La. 1996) 3

FCC v. League of Women Voters, 468 U.S. 364 (1984) ..... *passim*

44 Liquormart v. Rhode Island, 517 U.S. 484 (1996) 45

Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88 (1992) 43

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995) 14

In re Primus, 436 U.S. 412 (1978) 14, 15

International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) 28

James v. Strange, 407 U.S. 128 (1972) 32

Jones v. United States, 120 S. Ct. 1904 (2000) 24

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 10, 11, 16

Cited Authorities

Page

Lassiter v. Department of Social Servs., 452 U.S. 18 (1981) 16

Legal Aid Soc'y of Haw. v. Legal Servs. Corp., 961 F. Supp. 1402 (D. Haw. 1997), *vacated*, 981 F.3d 1017 (9th Cir.), *cert. denied*, 119 S. Ct. 539 (1998) 4, 36

Lowe v. SEC, 472 U.S. 181 (1985) 25, 37

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) ..... *passim*

McDonald v. Smith, 472 U.S. 479 (1985) 28

Meyer v. Grant, 486 U.S. 414 (1988) 28

Miller v. French, 2000 WL 775572 (U.S. June 19, 2000) 37

Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) 19

NAACP v. Button, 371 U.S. 415 (1963) ..... *passim*

National Endowment for the Arts v. Finley, 524 U.S. 569 (1998) 11, 18, 37, 45

Niemotko v. Maryland, 340 U.S. 268 (1951) 43

Page

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 45

Polk County v. Dodson, 454 U.S. 312 (1981) 19, 43

Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) 42

Regan v. Taxation with Representation, 461 U.S. 540 (1983) 7, 11, 23, 40, 41

Reno v. ACLU, 512 U.S. 844 (1997) 44

Riley v. National Fed'n of the Blind of N.C., 487 U.S. 781 (1988) 38

Rist v. Missouri State Div. of Family Servs., 595 S.W.2d 783 (Mo. Ct. App. 1980) 26

Romer v. Evans, 517 U.S. 620 (1996) 32

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) ..... *passim*

Rust v. Sullivan, 500 U.S. 173 (1991) ..... *passim*

Sable Communications v. FCC, 492 U.S. 115 (1989) 44

Santa Fe Ind. Sch. Dist. v. Doe, 2000 WL 775587 (U.S. June 19, 2000) 18

Cited Authorities

Page

Schacht v. United States, 398 U.S. 58 (1970) 23

Schneider v. State, 308 U.S. 147 (1939) 43

Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) 23, 44

Smith v. Goguen, 415 U.S. 566 (1974) 27

Speiser v. Randall, 357 U.S. 513 (1958) 10

Stromberg v. California, 283 U.S. 359 (1931) 27

Sweezy v. New Hampshire, 354 U.S. 234 (1957) .. 16

Tate v. Short, 401 U.S. 395 (1971) 32

Texas v. Johnson, 491 U.S. 397 (1989) 23

Traynor v. Turnage, 485 U.S. 535 (1988) 50

Turner Broadcasting Co. v. FCC, 512 U.S. 622 (1994) 42

TVA v. Hill, 437 U.S. 153 (1978) 50

United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967) 15

United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) 7, 9, 46, 47

Cited Authorities

Page

United States v. Padelford, 76 U.S. (9 Wall.) 531 (1869) 46

United States v. Playboy Entertainment Group, 120 S. Ct. 1878 (2000) 10, 38, 43, 45

United Transp. Union v. State Bar of Mich., 401 U.S. 576 (1971) 15

Varshavsky v. Perales, No. 40767/91 (N.Y. Sup. Ct. Dec. 24, 1996) 4, 36

Velasquez v. Legal Servs. Corp., 164 F.3d 757 (2d Cir. 1999) 5, 23, 37, 44

Velasquez v. Legal Servs. Corp., 985 F. Supp. 323 (E.D.N.Y. 1997) 5, 37, 42

West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) 19

Yee v. Escondido, 503 U.S. 519 (1992) 33

Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926) ... 25

Page

Statutes:

18 U.S.C. § 3501 46

42 U.S.C. § 2996(6) 1, 21, 48

42 U.S.C. § 2996e(b)(3) 1, 21, 48

42 U.S.C. § 2996f(a)(1) 1, 21, 48

42 U.S.C. § 2996f(b)(8)-(10) 2

42 U.S.C. § 2996i(c) 4

Internal Revenue Code § 501(c)(3) 40

Internal Revenue Code § 501(c)(4) 40

Pub. L. No. 104-134, § 504(a), 110 Stat. 1321 (1996) 2, 3, 4, 34, 50

Pub. L. No. 104-134, § 504(d), 110 Stat. 1321 (1996) 4, 34

United States Constitution:

First Amendment ..... *passim*

Page

Rules and Regulations:

20 C.F.R. § 416.1002 26

45 C.F.R. § 1610 .....5, 33, 36, 44

45 C.F.R. § 1639.2(b) 2

50 Fed. Reg. 49,276 (1985) 35

61 Fed. Reg. 41,960 (1996) 35

61 Fed. Reg. 63,749 (1996) 35

62 Fed. Reg. 30,763 (1997) 25

LSC Final Rule, "Use of Non-LSC Funds, Transfers of Funds, Program Integrity," 45 C.F.R. Part 1610 5

Sup. Ct. R. 14(1)(a) 33

Other Authorities:

ABA Comm. on Ethics and Prof. Resp., Formal Op. 96-399 (1996) 49

ABA Code of Prof. Respons., DR 5-107(B) (1976) 21

Cited Authorities

	Page
S. Rep. No. 104-392 (1996)	35
Association of Bar of City of N.Y., Comms. on Civ. Rts. & Prof'l Resp., *A Call for the Repeal or Invalidation of Congressional Restrictions on Legal Services Lawyers*, 53 The Record 13 (1998)	12
David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. Rev. 675 (1992)	11, 16
Richard Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4 (1988)	12
Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975)	12
Kenneth Karst, *Freedom of Intimate Association*, 89 Yale L.J. 624 (1980)	15
Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. Pa. L. Rev. 1293 (1984)	12
Note, *The Constitutionality of Excluding Desegregation from the Legal Services Program*, 84 Colum. L. Rev. 1630 (1984)	2

Page

Note, *Recent Legislation*, 110 Harv. L. Rev. 1346 (1997) 12

Robert C. Post, *Subsidized Speech*, 106 Yale L. J. 151 (1996) 12

Martin H. Redish & Daryl Kessler, *Government Subsidies and Free Speech*, 80 Minn. L. Rev. 543 (1996) 12

Jessica A. Roth, *It Is Lawyers We Are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation*, 33 Harv. Civ. Rts.-Civ. Lib. L. Rev. 107 (1998) 12, 14, 32

Kathleen Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989) 12

David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia, and Oregon Describe the Costs*, 17 Yale L. & Pol'y Rev. 337 (1997) 39

MARK YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983) 19

TABLE OF APPENDICES

Page

Appendix A — Relevant Statutes 1a

Appendix B — Memorandum Order Of The United States District Court For The Western District Of Louisiana, Lafayette-Opelousas Division In *Dugas, et al. v. Hoffpauir, et al.*, Civil Action No. 6:93-1699, Dated And Filed October 24, 1996 ..... 3a

Appendix C — Decision And Order Of The Supreme Court Of The State Of New York For The County Of New York In *Varshavsky, et al. v. Geller, et al.*, Index No. 40767/91, Dated And Filed December 24, 1996 ..... 6a

BRIEF OF RESPONDENTS

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

In addition to the laws identified in petitioners' briefs, this case involves article III of the U.S. Constitution and the provisions of the Legal Services Corporation Act of 1974, 42 U.S.C. §§ 2996(6), 2996e(b)(3), 2996f(a)(1), requiring federally funded Legal Services attorneys to adhere to ethical standards of the profession. Those statutory provisions are set forth in the appendix (App.) to this brief at 1a-2a.

STATEMENT OF THE CASE

From 1974 to 1996, a three-cornered partnership existed between and among Congress, private donors, and state and local governments permitting federally funded Legal Services lawyers[1] to offer a full spectrum of legal representation to indigent clients.[2] In 1996, Congress enacted a series of appropriations riders that effectively dissolved that partnership. First, Congress dramatically intensified the restrictions imposed on the use of federal funds by Legal Services lawyers. The particular 1996 restriction before the Court in this case forbids Legal Services lawyers from using federal funds to represent clients in "litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system," but authorizes Legal Services lawyers to represent "an individual eligible client

1. Strictly speaking, there is no such thing as a Legal Services lawyer, since the Legal Services Corporation (LSC) merely funnels congressionally appropriated funds to hundreds of local non-profit entities that actually hire and supervise federally funded lawyers for the poor in civil cases. For simplicity's sake, however, respondents will use the shorthand term "Legal Services lawyer" to refer to LSC-funded lawyers.

2. From the beginning, litigation in connection with public assistance has been central to the mission of Legal Services lawyers. *See* Brief (Br.) of LSC at 3. Congress's annual appropriation for LSC has ranged from less than $100 million when LSC was first established to $400 million in FY 1995. Congress appropriated $283 million for each of FY 1997 and FY 1998, and $305 million for FY 1999.

who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." Pub. L. 104-134, § 504(a)(16), 110 Stat. 1321, 1321-55 to 1321-56 (1996) (reproduced in Br. of U.S.-App. at 8a). The parties agree that the effect of Congress's baroque language is to authorize Legal Services lawyers to represent clients seeking welfare benefits under "existing law" — whatever that cryptic term may mean if it excludes the United States Constitution and the governing statutes as LSC suggests in its regulations, *see* 45 C.F.R. § 1639.2(b)[3] — but to forbid Legal Services lawyers from challenging the constitutionality or statutory validity of existing welfare statutes or regulations.[4]

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3. LSC's regulations concerning the welfare challenge provision are reproduced in Br. of U.S.-App. at 28a-30a.

4. In addition to the restriction before the Court in this case, the 1996 appropriations rider bars federally funded Legal Services lawyers from, among other things, participating in class actions, receiving court-awarded attorneys' fees under fee-shifting statutes, engaging in reapportionment litigation, appearing in administrative adjudication designed to make policy, and delivering legislative testimony without governmental invitation. *See* Pub. L. No. 104-134, §§ 504(a)(1)-(4), (7), (13), 110 Stat. at 1321-53 to 1321-56, Br. of U.S.-App. at 2a-3a, 8a. The 1974 LSC Act forbade the use of federal funds to represent clients in litigation seeking to desegregate schools, obtain non-therapeutic abortions, challenge Selective Service decisions, or defend against military desertion. *See* 42 U.S.C. § 2996f(b)(8)-(10). *See* Note, *The Constitutionality of Excluding Desegregation from the Legal Services Program*, 84 Colum. L. Rev. 1630 (1984). The constitutionality of selectively allocating Legal Services funding to impede the enforcement of disfavored legal rights has never arisen because, until 1996, gaps in congressional funding could be filled by the use of non-federal funds provided by state and local government. A petition for certiorari challenging the constitutionality of many of the 1974 and 1996 restrictions is pending before the Court. *Velazquez v. Legal Servs. Corp.*, No. 99-604. The 1996 restrictions were renewed by Congress in the 1997, 1998, 1999, and 2000 federal appropriations acts. *See* Br. of U.S.-App. at 18a-25a.

The impact of the congressional restriction currently before the Court, which became effective on or about September 1, 1997, was swift and dramatic. For example, respondent, Carmen Velazquez, then a 56-year-old grandmother living in the Bronx, had been represented by an attorney employed by Bronx Legal Services — an entity then receiving both federal funds from LSC and non-federal funds from the City and State of New York and from private donors. In connection with her claim that her public assistance benefits had been wrongfully terminated because of her presumed failure to have participated in a local job search program, Ms. Velazquez had asserted that a New York State regulation was unlawful because it did not afford her a pre-termination opportunity to demonstrate that physical impairments prevented her from working.[5] Since Ms. Velazquez was challenging, *inter alia*, a New York State welfare regulation, her claim was deemed barred by section 504(a)(16). Although adequate non-federal funding existed to allow Ms. Velazquez's Legal Services lawyer to continue the representation, the lawyer was forced to withdraw in order to preserve LSC funding for Bronx Legal Services, as well as for all other Legal Services programs in New York City.[6] Repeated efforts to locate substitute counsel failed,[7] and Ms. Velazquez suffered the permanent loss of the benefits at issue.

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5. *See* Amended Complaint ¶ 7(a), Joint Appendix (JA) at 17-18; Affidavit of Carmen Velazquez, JA at 51-55.

6. LSC has taken the position that a violation of section 504 by any LSC-funded lawyer in New York City triggers a cut-off of all federal funding to all LSC programs operating under the umbrella of Legal Services for New York City. After being forced to withdraw as Ms. Velazquez's lawyer, her Legal Services lawyer joined with the other plaintiffs to commence this action. She has since resigned from Bronx Legal Services, unable to practice effectively under Congress's restrictions.

7. Failure to locate substitute counsel for Ms. Velazquez was, sadly, not an isolated phenomenon. *See, e.g., Dugas v. Hoffpauir*, Civ. Action No. 6:93-1699 (W.D. La. 1996) (decertifying class

(Cont'd)

The 1996 Congress also shredded the fiscal safety net that in the past had permitted local Legal Services programs to use non-federal funds to fill gaps in Congress's funding. *See* Pub. L. 104-134, § 504(d)(2)(B).[8] The plain language of the appropriations rider and the first two sets of regulations issued by LSC absolutely forbade local Legal Services entities from using non-federal funds to provide forms of legal assistance prohibited by § 504(a). Once it became apparent, however, that Congress's effort to bar Legal Services programs from using non-federal funds to support a full spectrum of legal services for the poor was clearly unconstitutional under *FCC v. League of Women Voters*, 468 U.S. 364 (1984),[9] LSC executed a 180-degree turn in an effort to salvage Congress's constitutionally flawed handiwork. LSC withdrew its initial regulations and replaced them with two new sets of regulations purporting to permit local Legal

(Cont'd)
because of unavailability of substitute counsel to replace LSC-funded lawyer who was compelled by the restrictions to withdraw) (reproduced *infra* in App. at 3a-5a). *See generally* Br. of *Amici Curiae* N.Y. State Bar Ass'n, *et al.*, at 18-21 & n.5 (citing legal needs reports noting that between 70 and 90 percent of low-income households' legal needs are not being met).

8. The original Legal Services statute forbade Legal Services programs to use private donations to offer forbidden categories of legal representation, but contained no limitations on their use of state and local governmental funds. LSC Act § 1010(c), 42 U.S.C. § 2996i(c).

9. Two courts ruled that Congress's flat ban on the use of non-federal funds as implemented by LSC's first two sets of regulations was unconstitutional. *Varshavsky v. Perales*, No 40767/91, slip. op (N.Y. Sup. Ct. Dec. 24, 1996) (reproduced *infra* in App. at 6a-31a); *Legal Aid Soc'y of Haw. v. Legal Servs. Corp.*, 961 F. Supp. 1402 (D. Haw. 1997), *vacated*, 981 F.3d 1017 (9th Cir.), *cert. denied*, 119 S. Ct. 539 (1998). The District Court also made clear at oral argument in this case that LSC's initial refusal to permit the use of non-federal funds, and its clearly inadequate third set of regulations, violated *FCC v. League of Women Voters*.

Services entities to establish "separate" legal programs authorized to use non-federal funds to advance forbidden arguments — but only if the non-federally funded lawyers were housed in an expensive "physically . . . separate" facility.[10]

The District Court upheld both the congressional ban on using federal funds to challenge the legal *status quo* in welfare cases and the LSC restriction on the use of non-federal funds. LSC Cert. Pet. – App. at 44a-84a. Tellingly, however, the District Court explicitly found that the LSC requirement that non-federally funded lawyers be housed in a physically separate facility was not necessary to ensure the fiscal integrity of the federal program, since existing LSC rules already required precise record keeping and careful allocation of the cost of various activities. *Id.* at 73a. Rather, the District Court found that the requirement of physically separate facilities was justified solely by the need to prevent public confusion over whether the federal government "endorsed" Legal Services litigation against the government. *Id.* at 73a.

The Second Circuit, deeming itself bound by *Rust v. Sullivan*, 500 U.S. 173 (1991), affirmed the District Court's ruling that many of the 1996 restrictions on the use of federal funds by Legal Services lawyers were constitutionally permissible. LSC Cert. Pet.-App. at 13a-21a. The Circuit panel found that this Court's dictum in *Rust* suggesting that heightened First Amendment protection might attach to certain governmentally funded relationships of trust and confidence was not sufficiently precise to warrant providing heightened First Amendment protection to the relationship between a Legal Services lawyer and an indigent client. *Id.* at 13a-14a. Moreover, the Circuit panel rejected respondents' challenge to the LSC

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10. 45 C.F.R. § 1610.8(a)(3). *See* LSC Final Rule, "Use of Non-LSC Funds, Transfers of Funds, Program Integrity," 45 C.F.R. Part 1610 (reproduced in LSC Cert. Pet.-App. at 112a-125a) (summarizing LSC's fourth and final regulation).

requirement of a "physically separate" facility, ruling that the regulation was facially valid under *Rust*. *Id.* at 15a-20a.

A majority of the Circuit panel ruled, however, in an opinion authored by Hon. Pierre N. Leval, that Congress's decision to authorize federally funded Legal Services lawyers to represent indigent clients seeking welfare benefits, but to deny the lawyers the ability to challenge the constitutionality or statutory validity of an existing welfare statute or regulation, was a textbook case of allocating speech subsidies on the basis of viewpoint in violation of the First Amendment. *Id.* at 23a-28a. Judge Dennis Jacobs dissented, arguing that, under *Rust*, government is free to define the parameters of any program it funds without violating the First Amendment. *Id.* at 31a-41a.

Both sides sought certiorari. This Court granted petitioners' applications. The Court has not yet ruled in connection with respondents' petition, *Velazquez v. Legal Servs. Corp.*, No. 99-604.

SUMMARY OF ARGUMENT

Congress's decision to authorize federally funded Legal Services lawyers to represent indigent clients seeking welfare benefits in court, but to forbid those lawyers from challenging the constitutionality or statutory validity of welfare statutes or regulations, offends the First Amendment in multiple ways. In the first place, as the Court below held, Congress may not selectively allocate speech subsidies in a viewpoint-discriminatory manner, especially when, as here, Congress is attempting to shield the government's own viewpoint from effective challenge. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Board of Regents of Univ. of Wisc. v. Southworth,* 120 S. Ct. 1346 (2000). In addition, once Congress fosters the establishment of a traditional lawyer-client relationship, it may not seek to control the judgment of a federally funded lawyer concerning whether to advance otherwise appropriate legal arguments on a client's behalf, even

when the government subsidizes the relationship. *NAACP v. Button*, 371 U.S. 415 (1963); *Rust v. Sullivan*, 500 U.S. 173, 200 (1991). And, by additionally barring federally funded lawyers from using non-federal funds to advance such forbidden arguments, Congress violates the First Amendment yet again. *FCC v. League of Women Voters*, 468 U.S. 364; *Regan v. Taxation with Representation*, 461 U.S. 540 (1983). Finally, the ban on challenging the legal *status quo* in welfare cases also violates fundamental principles of separation of powers by limiting the flow of otherwise appropriate legal argument to the courts in an effort to shield government action from judicial review. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

Rust v. Sullivan cannot immunize Congress's restriction against First Amendment attack because, unlike *Rust,* it is impossible to characterize the government as the true speaker where, as here, a subsidized speaker is suing the government on behalf of an indigent client. Moreover, unlike *Rust,* it is impossible to deny that a traditional lawyer-client relationship exists between a Legal Services lawyer and an indigent client. Petitioners seek to blunt respondents' First Amendment challenge by claiming that Congress has merely chosen to subsidize one type of legal "service" (help getting benefits under "existing law"), rather than another type of legal "service" (help challenging "existing law"). But the government's argument reduces the First Amendment ban on viewpoint-discriminatory speech subsidies to an exercise in semantics. Virtually every viewpoint-discriminatory allocation of a speech subsidy may be similarly repackaged as a decision to fund one type of "program" or "service" rather than another. Moreover, no matter what semantic disguise it elects to don, government may not impose on subsidized speakers viewpoint-based restrictions openly designed to insulate particular government decisions from effective legal challenge. Finally, Congress's effort to draw a bright line between litigation seeking benefits *under* "existing

law," and litigation *challenging* "existing law," is incapable of principled application. For example, obtaining relief under so-called "existing law" often requires a Legal Services lawyer to challenge the constitutionality or statutory validity of the government's interpretation of an existing statute or regulation in order to invoke the appropriate canon of construction. Most significantly, the Constitution and statutes actually comprise "existing law," and a ban on challenging "existing law" is incoherent insofar as it ignores this basic fact.

Petitioners also claim that the ban on challenging the constitutional or statutory validity of existing welfare statutes or regulations does not materially burden the speech of a Legal Services lawyer because the regulation does not prohibit the lawyer from speaking freely to a prospective client, to other lawyers, and to the general public. The primary speaker in this case is not, however, the subsidized lawyer, but rather the client for whom the lawyer is acting as a speech-proxy in addressing the Court. Moreover, the relevant audience is not the client or the general public, but an official who can do something about the legal problem — a judge or an administrative official. Congress has carefully forbidden the subsidized Legal Services lawyer from addressing any member of that audience.

Finally, petitioners argue that Congress's speech ban does not burden the attorney-client relationship or the institutional integrity of the judiciary because it merely prevents the attorney-client relationship from forming in the first place, diverting both the client and the argument to other lawyers who are free to advance the forbidden argument. It is, however, pure fantasy for petitioners to claim that all that is happening here is the deflection of an indigent welfare client to another lawyer who is free to make the necessary arguments. In most communities, there are no alternatives to the local Legal Services program. Those few alternatives that do exist in some urban areas are overwhelmed. And the alleged freedom to establish non-federally funded Legal Services affiliates to perform the tasks

is a mirage because it requires the establishment of wasteful and expensive "physically separate" facilities imposing a significant economic burden on the use of non-federal funds without any plausible justification.

Congress's decision to restrict the use of non-federal funds as the price of receiving a federal speech subsidy is also a violation of the First Amendment. The textually absolute restriction enacted by Congress renders the congressional statute flatly unconstitutional under *FCC v. League of Women Voters*, and invalidates LSC's attempt to promulgate an unauthorized ameliorative regulation designed to save the statute. Moreover, the regulation is itself violative of the First Amendment because its requirement that lawyers using non-federal funds be housed in a wasteful and expensive "physically separate" facility imposes a severe economic burden on the use of non-federal funds without any legitimate justification.

Congress's decision to prevent Legal Services lawyers from challenging welfare laws also violates fundamental separation of powers principles. By authorizing Legal Services lawyers to help implement welfare laws by representing litigants in court, but barring those lawyers from arguing that the welfare laws are invalid, Congress has interfered with the courts' decisional processes and has done so in an improper effort to shield legislation from constitutional scrutiny. Congress has thus violated the principle, elucidated in cases including *Marbury v. Madison*, 5 U.S. (1 Cranch) 137; *United States v. Klein*, 80 U.S. (13 Wall.) 128; and *Dickerson v. United States*, 2000 WL 807223 (U.S. June 26, 2000), that the legislature may not seek to influence the outcome of pending cases by dictating a decisional process, overruling this Court's constitutional rulings or, as here, controlling the flow of information and argument to the courts.

It is possible, however, to avoid the serious constitutional issues raised by Congress's speech ban by reading the text of the LSC Act of 1974 — which repeatedly mandates strict

compliance with the highest standards of legal ethics — harmoniously with the restrictions imposed by the 1996 appropriations rider to authorize Legal Services lawyers to advance arguments premised on unconstitutionality or statutory invalidity when failure to do so would force a Legal Services lawyer to risk violating an ethical duty to one client in order to prevent the loss of funding for the program's remaining clients.

ARGUMENT

I.

CONGRESS'S EFFORT TO AUTHORIZE FEDERALLY FUNDED LEGAL SERVICES LAWYERS TO REPRESENT INDIGENT CLIENTS SEEKING WELFARE BENEFITS UNDER "EXISTING LAW" BUT TO FORBID THE LAWYERS FROM ADVANCING ANY ARGUMENT THAT WOULD "AMEND OR OTHERWISE CHALLENGE EXISTING LAW" VIOLATES THE FIRST AMENDMENT

Classically, the First Amendment is invoked when the State acts negatively to limit the flow of disfavored speech. *See, e.g., United States v. Playboy Entertainment Group,* 120 S. Ct. 1878 (2000). But the First Amendment plays an important role, as well, in those settings where government acts positively to enable First Amendment activity that might not otherwise occur.[11] In recent years, this Court has

11. *See, e.g., Keyishian v. Board of Regents,* 385 U.S. 589 (1967) (academic freedom in state subsidized higher education); *Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753 (1995) (equal access to public property designated as a public forum); *League of Women Voters,* 468 U.S. 364 (protecting use of private funds by subsidized speaker); *Speiser v. Randall,* 357 U.S. 513 (1958) (invalidating unconstitutional condition on receipt of government funds); *Cammarano v. United States,* 358 U.S. 498 (1959) (upholding limits on use of tax deductible funds for lobbying); (Cont'd)

repeatedly recognized that viewpoint-discriminatory speech subsidies violate the First Amendment because they distort the operation of an intellectual free market as seriously as do viewpoint-discriminatory speech prohibitions. *See Rosenberger*, 515 U.S. 819 (invalidating viewpoint-discriminatory subsidy); *Arkansas Educ. Television v. Forbes*, 523 U.S. 666 (1998) (warning against viewpoint-discriminatory subsidy); *Southworth,* 120 S. Ct. at 1357 (disapproving majoritarian allocation of subsidies as inviting viewpoint discrimination). *See also National Endowment for the Arts v. Finley*, 524 U.S. 569, 580-82 (1998) (construing government art funding statute narrowly to minimize risk of viewpoint-based discrimination).

Additionally, in *Rust*, the Chief Justice suggested that the First Amendment places limits on the power of government to interfere with traditional associational relationships of trust and confidence, even when the government subsidizes the relationship. *See* 500 U.S. at 200. *See also Button*, 371 U.S. 415 (recognizing that attorney-client relationship is protected by freedom of association); *Keyishian*, 385 U.S. 589 (protecting student-teacher relationship in state subsidized higher education). Congress's effort in this case to limit the speech of subsidized Legal Services lawyers violates both sets of First Amendment protections.[12]

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Taxation with Representation, 461 U.S. 540 (upholding grant of tax deductibility for lobbying expenses to Veterans' groups based on sacrifices of veterans). *See also Rust*, 500 U.S. at 200 (suggesting special First Amendment protection for certain government-subsidized relationships).

12. The role of the First Amendment in subsidized speech settings has been the subject of considerable academic commentary. *See, e.g.*, David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L.

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A. Congress May Never Allocate Speech Subsidies to Shield the Government's Viewpoint From Challenge

Congress's statutory scheme authorizes a subsidized Legal Services lawyer to urge a judge, on behalf of an indigent client, to enforce an existing welfare statute or regulation, but forbids the lawyer from urging the judge to view a particular welfare statute or regulation as unenforceable because it violates the Constitution or is inconsistent with governing statutory law or regulations. Congress has, therefore, not only openly allocated a crucial speech subsidy on the basis of viewpoint, it has done so in a self-interested manner designed to insulate the government's own viewpoint about the validity of its laws from effective challenge by the subsidized speaker. There simply could not be a more egregious violation of the core First Amendment principle of viewpoint neutrality. *See generally* Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975).

This Court has invalidated far less egregious efforts to allocate speech subsidies on the basis of viewpoint. In *Rosenberger*, for example, the University of Virginia

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Rev. 675 (1992); Richard Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4 (1988); Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. Pa. L. Rev. 1293 (1984); Robert C. Post, *Subsidized Speech*, 106 Yale L. J. 151 (1996); Martin H. Redish & Daryl Kessler, *Government Subsidies and Free Speech*, 80 Minn. L. Rev. 543 (1996); Kathleen Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989). For trenchant criticism of the very restriction before the Court, see Jessica A. Roth, *It Is Lawyers We Are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation*, 33 Harv. Civ. Rts.-Civ. Lib. L. Rev. 1630 (1998); Association of Bar of City of N.Y., Comms. on Civ. Rts. & Prof'l Resp., *A Call for the Repeal or Invalidation of Congressional Restrictions on Legal Services Lawyers*, 53 The Record 13 (1998). *See also* Note, *Recent Legislation*, 110 Harv. L. Rev. 1346, 1348-49 (1997).

provided subsidies to a broad array of student publications without regard to viewpoint, but declined, in deference to Establishment Clause values, to subsidize student religious publications. This Court ruled that Virginia's refusal to subsidize student religious publications constituted forbidden viewpoint-based discrimination despite the fact that Virginia was not motivated by hostility to religion. Justice Kennedy, writing for the Court, explained that the fact that the restriction even-handedly proscribed speech reflecting both religious and anti-religious perspectives in no way lessened the harm of the exclusion, or transformed it into one based on content, rather than viewpoint: "It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint." 515 U.S. at 831. In this case, even more so than in *Rosenberger*, in allocating speech subsidies Congress has singled out for exclusion a particular "perspective on the debate": the perspective suggesting government has enacted an illegal law.

In *Forbes*, this Court recognized that a public television station, as a protected speaker, enjoys broad First Amendment-based editorial discretion in structuring a candidate debate, including the right to exclude candidates with insufficient public support. The Court warned, however, that since a televised debate on public television is a form of government speech subsidy, access may not constitutionally be allocated on the basis of a candidate's viewpoint. 523 U.S. at 675-76.

Finally, in *Southworth*, the University of Wisconsin used mandatory student activity fees to provide speech subsidies on a viewpoint-neutral basis to a broad array of student organizations. The Court reaffirmed that, except where the government retains agents to communicate a government-defined message as in *Rust*, government speech subsidy

programs must always be scrupulously viewpoint-neutral, whether or not they unfold in a "public forum in the traditional sense of the term." 120 S. Ct. at 1354. *Southworth* rejected an effort by dissenting students to demand a *pro rata* refund for subsidies to organizations with which they disagreed. But the Court disapproved the practice of allocating speech subsidies by a vote of the student body, holding that such an overtly majoritarian allocation process poses too great a risk of viewpoint discrimination. *Id.* at 1357.

In each of *Rosenberger*, *Forbes*, and *Southworth*, the Court condemned a viewpoint-discriminatory allocation decision as a violation of the First Amendment. But in none of those cases was the government, as here, deploying speech subsidies on a self-interested basis, permitting recipients to support the government's viewpoint while simultaneously barring the subsidized speakers from seeking to mount an effective challenge to the government's viewpoint. It is not hyperbole, therefore, to observe that what Congress has done in this case is the most egregious violation of viewpoint neutrality to have come before the Court in recent years.

B. Congress May Not Forbid a Subsidized Lawyer from Advancing Otherwise Appropriate Legal Arguments on Behalf of an Indigent Client

The First Amendment does more than protect a lawyer's ability to speak in court on behalf of a client. It protects, as well, a client's right to associate freely with a lawyer in an expressive associational relationship of trust and confidence designed to advance the client's interests. *See, e.g.*, *In re Primus*, 436 U.S. 412 (1978); *Button*, 371 U.S. 415. *See* Roth, *supra*, 33 Harv. Civ. Rts.-Civ. Lib. L. Rev. at 111-14.[13]

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13. For recent cases recognizing that the First Amendment provides significant protection to expressive association, *see Hurley*

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This Court has repeatedly recognized that the intense bond between lawyer and client is an expressive associational relationship protected by the First Amendment against undue government interference. For example, in *Button*, Virginia attempted to invoke its barratry laws to prevent lawyers for the NAACP from counseling prospective clients about the possibility of litigation challenging segregated facilities. This Court rebuffed the attempted prosecution, holding that the associational bond between a lawyer and a prospective client (much less, as here, an existing client) is fully protected by the First Amendment. *See* 371 U.S. at 437. Similarly, in *In re Primus*, 436 U.S. at 431-32, 439, this Court refused to permit South Carolina to bar an ACLU lawyer from informing prospective clients — women who had been sterilized as a condition of receiving welfare benefits — of the availability of free legal assistance, on the ground that the First Amendment protected speech and association between lawyer and client from government interference. *See also Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1977) (invalidating Virginia's effort to prevent a labor union from referring its members' federal safety claims to selected lawyers); *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971) (rebuffing Michigan's effort to prevent a union from referring its members' safety claims to lawyers promising to charge a reduced fee); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967) (holding that the First Amendment associational bond between lawyer and client precluded Illinois from applying its ethics rules against

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v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995); *California Democratic Party v. Jones*, 2000 WL 807188 (U.S. June 26, 2000); *Boy Scouts of Am. v. Dale*, 2000 WL 826941 (U.S. June 28, 2000). A lawyer-client relationship is the paradigm of a protected expressive association. *See* Kenneth Karst, *Freedom of Intimate Association*, 89 Yale L.J. 624 (1980).

a lawyer who was employed by a labor union to handle its members Workers' Compensation claims).

While Congress is not constitutionally obligated by the due process or equal protection clauses to provide lawyers for in the poor in all civil cases,[14] once Congress elects to fund a lawyer-client relationship, the First Amendment precludes government from denying an indigent client the ability to enjoy the benefits of such an expressive associational relationship, even when the government is paying for it. *Keyishian*, 385 U.S. 589; *Rust*, 500 U.S. at 200. Our law recognizes at least three important expressive associational relationships of trust and confidence that merit First Amendment protection, even when the relationship is subsidized by the government. This Court has held that the associational bond between university teacher and student precludes government from dictating the content of a professor's speech, even when the professor is employed by a government-funded institution. *Keyishian*, 385 U.S. 589. *See also Sweezy v. New Hampshire*, 354 U.S. 234 (1957). *See generally* Cole, *supra*, 67 N.Y.U. L. Rev. 675. The *Keyishian* Court explained that the functional integrity of the academic relationship between teacher and student rests on First Amendment protection of the ability of a university teacher to provide students with autonomous judgments that are not dictated by the state. 385 U.S. at 603-04.

Similarly, the functional integrity of the relationship between doctor and patient requires First Amendment associational protection assuring the patient that the government-funded doctor is free to provide the autonomous professional judgment that characterizes such a relationship, and not political medicine.

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14. *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981). The *Lassiter* Court was unanimous, however, in recognizing a right to appointed counsel in cases where the issues require the presence of counsel for adequate ventilation. *Id.* at 31-34, 37-38.

The lawyer-client relationship merits at least an equivalent level of First Amendment associational protection. When an indigent client enters into an expressive associational bond with a government-subsidized lawyer, the client is constitutionally entitled to confidence that the representational judgments made by a government-funded lawyer are as protected from political manipulation as are the analogous judgments of a government-subsidized university professor, or a government-subsidized doctor. As the Chief Justice observed in *Rust*:

> [W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment. *It could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from government regulation, even when subsidized by the Government.*

500 U.S. at 200 (citation omitted and emphasis added). As the *Rust* Court's dictum suggests, when the government funds an attorney-client relationship, the spending power may not be used to manipulate the expressive associational activities of the participants.

C. Petitioners' Efforts to Invoke *Rust v. Sullivan* to Avoid the Force of Respondents' First Amendment Objections Are Unavailing

Rust does not immunize Congress's speech ban from First Amendment attack. In *Rust*, Congress established a federally funded family planning program that explicitly excluded abortion as an acceptable form of family planning

and, according to the government, forbade doctors employed by the program from discussing abortion with their patients.[15] This Court upheld the restriction on the doctors' speech by a vote of 5-4, reasoning, first, that the true First Amendment speaker in *Rust* was the government, using paid doctor-spokespersons to disseminate a narrowly defined substantive message about the state-preferred forms of family planning, 500 U.S. at 194;[16] and, second, that a "traditional" doctor-patient expressive associational relationship did not exist in the context of a family planning clinic that purported to provide only an extremely narrow sliver of medical assistance. 500 U.S. at 200. Petitioners argue that Legal Services lawyers are likewise merely paid agents of the

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15. Justice O'Connor declined to read the statute in *Rust* as forbidding doctors employed in a family planning clinic to talk about abortion with their patients. 500 U.S. at 223-25 (O'Connor, J., dissenting). *See also Finley*, 524 U.S. at 580-82 (construing a government art funding statute narrowly to avoid risk of viewpoint-based discrimination).

16. In its recent subsidized speech cases, the Court has repeatedly emphasized that the result in *Rust* hinged on this all-important distinction. *See Rosenberger*, 515 U.S. at 833 ("[In *Rust*], the government did not create a program to encourage private speakers, but instead used private speakers to transmit specific information pertaining to its own program."); *Finley*, 524 U.S. at 612 ("Drawing on the notion of government-as-speaker, we held in *Rust v. Sullivan*, 500 U.S. at 194, that the Government was entitled to appropriate public funds for the promotion of particular choices among alternatives offered by health and social service providers."); *Southworth*, 120 S. Ct. at 1357 ("Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different.") (citing *Rust*, 500 U.S. 173, and other cases) *See also Santa Fe Indep. Sch. Dist. v. Doe*, 2000 WL 775587, at *6 (U.S. June 19, 2000) (reaffirming significant First Amendment distinction between government speech and private speech pursued under government program).

government, delivering a narrowly defined "service" that forbids them from challenging the legal *status quo* on behalf of their indigent clients, just as the doctors in *Rust* were forbidden to venture beyond their narrowly defined "program" in serving their indigent patients.

Whatever the dubious wisdom of *Rust* on its facts, its reasoning cannot possibly apply to the self-interested, viewpoint discriminatory speech subsidy at issue in this case.[17] First, unlike *Rust*, it is impossible to characterize the government as the true speaker where a Legal Services lawyer is suing the government on behalf of an indigent client. *See Polk County v. Dodson*, 454 U.S. 312, 320 (1981)

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17. Respondents do not question the central legal premise of *Rust*: that government may speak in support of its programs free from the usual constraints of viewpoint neutrality. *See* MARK YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983). But respondents respectfully suggest that *Rust* erred in its application of that premise to the facts of that case because the true speaker in *Rust* was not the government, but a doctor who was performing as a medical professional and not as a propagandist. Characterizing family planning clinic doctors as mere shills for the government's viewpoint denigrates their professional role in the program. Even more importantly, for many indigent women seeking medical assistance at a family planning clinic, the clinic doctor is the only physician they consult during their pregnancies, rendering the doctor-patient relationship in *Rust* one of enormous associational significance for many poor patients. The significant disconnect between the unobjectionable legal principle asserted in *Rust*, and its questionable application, has caused confusion at every level of government. *See, e.g., Brooklyn Inst. of Arts & Sciences v. City of New York*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999) (invalidating effort to punish government-subsidized Brooklyn Museum for displaying controversial works of art). Thus, although it is not necessary to do so in order to affirm the ruling below, respondents urge the Court to re-consider its holding in *Rust*. *See West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

(subsidized lawyers for the poor cannot be viewed as acting on behalf of the state in view of their duty of "undivided loyalty" to their clients and the corresponding "assumption that counsel will be free of state control"). Unlike the doctors in *Rust*, when a Legal Services lawyer speaks in court, the lawyer cannot fairly be characterized as articulating a substantive message on behalf of the State. Rather, the lawyer speaks on behalf of an indigent client, to whom the subsidized lawyer owes both ethical and statutory duties of unfailing loyalty. To the extent the government "speaks" in such a setting, it is through the words of its own lawyers and its own officials, not by commandeering the voices of the subsidized counsel that oppose it in litigation.

In establishing the Legal Services program in 1974, Congress self-consciously chose a broadly decentralized private structure designed to insulate Legal Services lawyers against government pressure to alter their speech. In order to foster independence from the government, Congress eschewed the creation of a centrally controlled Legal Services bureaucracy, electing to disburse Legal Services funds on a viewpoint neutral basis to an extremely broad array of private entities for use in hiring lawyers for the poor who would owe allegiance, not to the government, but to the private entities who hired them, and, most importantly, to the indigent clients they were pledged to serve. In order to further insulate Legal Services lawyers from government pressure, Congress provided for an autonomous private entity, LSC, to be the conduit through which congressional subsidies flowed to the numerous private entities who actually hire and supervise Legal Services lawyers. Finally, to ensure that Legal Services lawyers would speak for their clients, and not be tempted to deliver the government's preferred message, Congress repeatedly stressed that Legal Services

lawyers were to be governed by the canons of ethics and the Code of Professional Responsibility.[18]

Applying the reading of *Rust* as adopted in both *Rosenberger* and *Southworth*, we deal here, not with a government speaker charged with disseminating a particular government message as part of a narrowly focused substantive government program, but with a government decision to distribute speech subsidies to a broad array of private speakers on a viewpoint-neutral basis to ensure that vigorous and independent lawyers will be available to speak in court on behalf of the poor — even when that speech challenges the government's own policies. Under the clear holdings of this Court, such a widely available private speech subsidy may not be allocated in a viewpoint discriminatory manner, especially when, as here, the government is seeking to insulate its own viewpoint from effective challenge.

Despite its clear inapplicability to a program involving a broad array of subsidized private speakers and an intensely protected lawyer-client relationship, petitioners seek to invoke *Rust* on three levels. First, they argue that, as in *Rust*, government is free to subsidize one set of legal services without subsidizing other services. Second, they argue that, unlike the doctors in *Rust*, Legal Services lawyers are not absolutely forbidden to speak to clients about flaws in existing welfare law. Third, they argue that other lawyers remain free to advance the forbidden arguments. None of the three arguments can withstand First Amendment scrutiny.

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18. *See* 42 U.S.C. §§ 2996(6), 2996e(b)(3), 2996f(a)(1). Those professional standards explicitly prohibit a lawyer from allowing "a person who . . . pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." ABA Code of Prof. Respons., DR 5-107(B) (1976).

1. Congress's Ban on Challenging the Legal *Status Quo* Cannot be Defended as a Decision to Offer Differing Categories of Legal Service

Petitioners deny that Congress is engaging in forbidden viewpoint discrimination. They maintain instead that Congress has merely chosen to subsidize one type of legal "service" (help getting benefits *under* "existing law"), rather than another (help *challenging* "existing law"). But petitioners' argument reduces the First Amendment ban on viewpoint-discriminatory speech subsidies to a tautology. Virtually every viewpoint discriminatory allocation of a speech subsidy can be repackaged semantically as a decision to fund one "program" or "service" rather than another. For example, in *Rosenberger*, the University of Virginia argued that its student publication subsidy "program" was confined to secular speech, and that speech by religious publications was simply beyond the contours of the services subsidized by the government-defined "program." This Court rejected Virginia's effort to supplant analysis with labels, holding that the boundaries of a government "program" or "service" cannot be made coterminous with whatever speech restrictions the government wishes to impose on a subsidized speaker. Indeed, if petitioners' effort to repackage Congress's speech ban as a decision to fund one "service" but not another were accepted, the careful attempts of this Court to erect First Amendment limits in the area of subsidized speech would be reduced to an exercise in semantics.[19]

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19. The Court "ha[s] never countenanced such linguistic prestidigitation," *see City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 769 (1988), repeatedly rejecting similar semantic efforts to repackage censorship as a decision to regulate something other than speech. *See, e.g., Button*, 371 U.S. at 429 ("[The government] cannot foreclose exercise of constitutional rights by mere labels.") (rejecting claim that "solicitation" of clients by public

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Moreover, unlike the usual funding decision, Congress's strategic allocation of subsidies in this case is openly designed to shield the government's viewpoint from effective challenge by the subsidized speaker. *See Schacht v. United States*, 398 U.S. 58 (1970) (invalidating statute permitting military uniforms to be worn only in expressive settings favorable to the government). As a quintessentially self-interested effort to shield the government's viewpoint from effective challenge by a subsidized speaker, the speech ban before the Court cannot be defended as a legitimate judgment about what type of government "service" to subsidize. When, as here, the government elects to define its subsidized "program" or "service" to include only speech that supports the government's viewpoint, while self-consciously forbidding speech that opposes it, the government violates the First Amendment whatever semantic disguise it chooses to deploy. *See Taxation with Representation*, 461 U.S. at 548 (allocation decisions may not aim at the suppression of disfavored ideas); *Rosenberger*, 515 U.S. at 825 (rejecting argument that ban on all religious speech is content, not viewpoint based).[20]

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interest lawyers is not a form of political and expressive association); *Buckley v. Valeo*, 424 U.S. 1, 16-17 (1976) (rejecting argument that regulation of campaign spending concerns money, not speech); *Texas v. Johnson*, 491 U.S. 397 (1989) (rejecting argument that flag-burning is an action, not speech); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (rejecting argument that regulation of demonstration is not regulation of speech).

20. Petitioners seek to analogize Congress's ban on challenging the legal *status quo* in a welfare case to the more absolute subject matter restrictions in the LSC statute, such as the long-standing ban on participating in school desegregation litigation or the newly imposed ban on appearing in reapportionment cases. The analogy breaks down, however, because, as the court below noted, the absolute subject matter bans do not require a lawyer to argue only one side of an issue. LSC Cert. Pet.-App. at 23a-24a. *See* discussion *infra* at Point I.C.3.

Finally, despite petitioners' insistence that Congress is funding a discrete, identifiable legal service, it is simply impossible to subdivide the practice of welfare law into watertight compartments that separate claims *under* existing law from claims *challenging* existing law, especially at the critical threshold of the initiation of the attorney-client relationship. In the first place, petitioners' attempt to characterize Congress's restriction as nothing more than a decision to subsidize arguments *under* "existing law," but to refrain from subsidizing arguments *challenging* "existing law" is incoherent and incapable of principled application because it ignores the single most important attribute of the American legal system — recognition that the Constitution and governing statutes are "existing law," fully capable of judicial enforcement in every case. *Marbury*, 5 U.S. (1 Cranch) at 178. When a Legal Services lawyer invokes the Constitution or a statute in support of an indigent client's legal rights, the lawyer is invoking "existing law" as surely as if the lawyer were invoking a newly minted administrative regulation.

Moreover, in the day-to-day practice of welfare law, it is often impossible for a Legal Services lawyer to know at the outset of an attorney-client relationship whether an indigent client who has been denied welfare benefits should seek relief under existing statutes or regulations, or must instead challenge existing law. Welfare clients simply do not appear on the doorstep color-coded by argument. For example, obtaining relief under so-called "existing law" often requires a Legal Services lawyer to challenge the constitutionality or statutory validity of the government's interpretation of an existing statute or regulation in order to invoke the familiar canon of construction that ambiguous statutes and regulations should be read to avoid constitutional questions. *See, e.g., Jones v. United States*, 120 S. Ct. 1904, 1911 (2000); *Ashwander v. TVA*, 297 U.S. 288, 341, 346

(1936) (Brandeis, J., concurring). But under Congress's prohibition, a Legal Services lawyer dare not invoke the principle of constitutional avoidance because it often leads to the invalidation of an existing welfare statute or regulation. *See, e.g., Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926) (declaring law unconstitutional after rejecting saving statutory construction urged in the interest of constitutional avoidance); *Lowe v. SEC*, 472 U.S. 181, 211-36 (1985) (White, J., concurring) (same). Legal Services programs face draconian consequences if they should guess wrong about whether an argument is "under" existing law, or "challenges" existing law: complete loss of funding, leaving the program's other clients without counsel.[21] Legal Services lawyers are thus under enormous pressure to avoid any legal argument, such as the canon of constitutional avoidance, that places an existing welfare law in jeopardy, even though the lawyer's basic aim is to force the government to alter its incorrect interpretation of existing law, or its flawed approach to fact-finding.[22]

The wholly artificial line between arguments under existing law and arguments challenging existing law is rendered even more arbitrary and unpredictable by LSC's concession that welfare "policies" may be challenged, but not welfare "regulations" or "statutes." Br. of LSC at 7.[23]

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21. Indeed, the restriction places even more pressure on Legal Services lawyers who are caught between an obligation to obey the rule and professional qualms about splitting their client's claims — an option that carries with it a serious risk of claim preclusion.

22. That was precisely the plight of Ms. Velazquez's Bronx Legal Services lawyer who was seeking merely to have Ms. Velazquez restored to benefit status by arguing that a state regulation was both unconstitutional and unauthorized by statute if construed to permit termination without an opportunity to explain why compliance with the job search rules was impossible because of health.

23. 62 Fed. Reg. 30, 763, 30,765-66 (1997) (permitting challenges to "policies").

But it is often impossible to know, especially at the outset of an attorney-client relationship, whether a welfare denial was based on "policy," "regulation," "statute," or on some combination of the three. *See, e.g., Rist v. Missouri State Div. of Family Servs.*, 595 S.W.2d 783, 785 (Mo. Ct. App. 1980) (assuming without determining that provision of agency's Income Maintenance Manual on which agency relied "reflects the content of a regulation adopted by the Division of Family Services").[24] What begins as a challenge to a "policy" often evolves into a challenge to a "regulation," or a "statute" or, at least, a challenge to the current interpretation of a regulation or statute. *See, e.g., Baylor v. New Jersey Dep't of Human Servs.*, 561 A.2d 618 (N.J. App. Div. 1989) (although plaintiff originally believed and administrative law judge found that state welfare regulation entitled her to benefits, agency subsequently issued a differing interpretation of regulation giving rise to need to argue that agency's interpretation should be rejected in order to avoid constitutional issue).

Given the impossibility of deciding whether a particular client's needs fall on the permitted or forbidden side of an incomprehensible line, especially at the outset of an attorney-client relationship, the hopelessly incoherent congressional standard is flatly violative of the First Amendment. The imposition of such an inherently unpredictable and intrusive standard as the guidepost for crucial First Amendment

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24. For example, the Social Security Administration's policies are collected in the Program Operations Manual System (POMS), a document running to more than 1,000 pages designed to guide local officials. *See* 20 C.F.R. § 416.1002. As a matter of theory, a policy codified in the POMS must be based on an interpretation of existing statutes or regulations. Thus, any challenge to a "policy" codified in the POMS risks calling into question the regulation or statute upon which it is premised.

activity has been repeatedly rejected by this Court. *See, e.g.*, *Smith v. Goguen*, 415 U.S. 566 (1974); *City of Lakewood*, 486 U.S. 750; *Stromberg v. California*, 283 U.S. 359 (1931).[25]

2. Petitioners' Assertion That Congress's Restriction Does Not Materially Interfere With Free Speech Misidentifies Both the Primary Speaker and the Relevant Audience

Unable to mount a plausible argument that, as in *Rust*, the government is the true speaker, petitioners argue, instead, that no material interference with free speech is imposed by Congress's ban. Since, argue petitioners, a Legal Services lawyer is free to tell a client and the general public that, in the lawyer's opinion, existing welfare law is either unconstitutional or unauthorized by statute, the ban on advancing forbidden arguments in court does not impose a material burden on the lawyer's free speech rights. But the primary speaker in this case is not the subsidized lawyer. It is the indigent client for whom the lawyer is acting as a speech-proxy in addressing the Court. To the extent that Congress's ban prevents an indigent client from addressing legitimate arguments to the Court through counsel, it clearly impinges on a client's interest that this Court has repeatedly recognized is protected by the First Amendment. *See Button*, 371 U.S. at 429 ("litigation . . . is thus a form of political expression" that clients pursue through their lawyers); *Buckley v. American Constitutional Law Found.*, 525 U.S.

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25. Congress's restriction is rendered even less coherent by its temporal component. Pre-1996 law may be challenged. Post-1996 law may not be challenged. It is often impossible, however, to know at the outset of a case whether a given determination is based on pre- or post-1996 law. *See, e.g., Civetti v. Commissioner of Pub. Welfare*, 467 N.E.2d 101, 105 n.6, 106 (Mass. 1984) (agency notified plaintiff that it had terminated her benefits in reliance on older regulations, but trial court determined that it was newer regulations that were applicable to her case).

182, 192 nn.11-12 (1999) (restriction on person's ability to hire third party for assistance in pursuing political speech impinges on both parties' First Amendment rights); *Meyer v. Grant*, 486 U.S. 414, 422-23 (1988) (same).

Moreover, petitioners completely misidentify the relevant speech market. It would be unavailing for a Legal Services lawyer to speak to a client or to the general public about the alleged unconstitutionality or statutory invalidity of a welfare statue or regulation. The relevant audience is an official who can do something about the problem — a judge or an administrative official. But Congress has carefully forbidden a Legal Services lawyer from addressing any member of that audience.[26] Petitioners simply ignore the fact that an American courtroom is a specialized example of a free market in ideas.[27] Within the bounds of relevance and

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26. Congress's effort to prevent subsidized lawyers from speaking to government officials about their client's problems may be characterized as a denial of the right to petition for redress of grievances, as well as a violation of the First Amendment's speech clause. The analysis would appear to be identical. *See McDonald v. Smith*, 472 U.S. 479 (1985).

27. Petitioners' observation that a courtroom is not a public forum hardly requires response. Neither a courtroom nor a university seminar are public fora in the sense that the general public may not freely participate in the discourse. Each is, however, a quintessential intellectual free market, fully protected by the First Amendment from government efforts to use law to skew the discourse in favor of its viewpoint. Moreover, regardless of how the Legal Services program or a courtroom would be classified under the First Amendment's public forum taxonomy, this Court has repeatedly stressed that even "the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint." *Forbes*, 523 U.S. at 682. *See, e.g., Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800, 806 (1985); *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679-80 (1992). Just this

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the rules of procedure, opposing lawyers are encouraged — indeed, mandated — to present all plausible legal and factual arguments to a neutral arbiter whose task it is to assess their relative merits and "say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177. The principal role of an American lawyer in such a microcosm of an intellectual free market is, quite literally, to serve as a client's "mouthpiece," translating a client's needs and hopes into the complex language of the law. Where private resources are inadequate to ensure the presence of counsel, the American legal system goes to extraordinary lengths to provide a subsidized lawyer to speak for an indigent litigant.[28] Congress and the states expend hundreds of millions of dollars each year to provide subsidized counsel to indigent persons because we understand that the integrity of our adversary system of justice turns on whether both sides are equally free to say all that needs to be said. Nothing could be more destructive of the crucial role that subsidized counsel plays in assuring the integrity of our adversary system of justice than a government effort to prevent federally funded lawyers from freely translating the needs of indigent litigants into otherwise appropriate legal arguments merely because, as here, government vigorously disagrees with — and apparently fears — those arguments.

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term in *Southworth*, the Court affirmed yet again this bedrock principle, holding that though "the [program at issue] [wa]s not a public forum in the traditional sense of the term," nonetheless "[t]he standard of viewpoint neutrality found in the public forum cases provides the standard we find controlling." 120 S. Ct. at 1354.

28. *See, e.g., Argersinger v. Hamlin*, 407 U.S. 25 (1972) (requiring appointed counsel in criminal cases involving potential loss of liberty).

3. Congress's Restriction Does Not Merely Deflect Indigent Clients to Other Lawyers Who Are Free to Raise the Forbidden Arguments

Petitioners argue that the ban on challenging the legal *status quo* in welfare cases is no different from the absolute bans on litigating in certain subject matter areas that exist in the LSC statute. Unlike every other subject matter restriction contained in the LSC statute, however, the ban on challenging "existing law" at issue in this case is openly premised on hostility toward legal arguments challenging a particular government viewpoint. It is, therefore, quintessentially self-interested, as well as viewpoint-discriminatory. As such, it is uniquely violative of the principle of viewpoint neutrality. Given the blatantly unconstitutional nature of such a self-interested, viewpoint discriminatory speech ban, the fact that other lawyers may be available to deliver the message, or that the silenced Legal Services lawyer is free to address other audiences, can never be sufficient to cure the First Amendment violation. As Justice Scalia noted in rejecting a similar argument in *California Democratic Party v. Jones*:

> In the end, however, the effect of [the challenged speech restriction] on these other activities is beside the point. We have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired.

2000 WL 807188, at *7.[29]

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29. If, for example, Congress were to attempt to restrict a professor at a state-subsidized university to supporting the government's viewpoint, it would not be a defense that private universities exist where students may receive unfettered instruction. The fact that unfettered lawyers may exist is, similarly, no defense to placing unconstitutional speech restrictions on subsidized lawyers.

Moreover, petitioners' effort to defend the speech ban because it "merely" prevents a lawyer from entering court on a client's behalf in the first place turns on a wholly formalistic distinction between imposing a viewpoint discriminatory ban on a subsidized lawyer's argument in court (which petitioners appear to concede would be unlawful), and forbidding a subsidized lawyer to take a case in the first place solely because of the anti-government arguments the lawyer would be obliged to advance in court (which petitioners argue is legal). If government may not impose a self-interested, viewpoint-based speech restriction on a subsidized lawyer in court, why should it be able to prevent the subsidized lawyer from entering the courtroom in the first place solely on the basis of what the lawyer will say?

Finally, it is pure fantasy for petitioners to claim that all that is happening here is the deflection of an indigent welfare client to another lawyer who is free to make the necessary arguments.[30] As the plight of Carmen Velazquez makes clear, in most communities there are no alternatives to the local Legal Services program. Those underfunded alternatives that do exist in a few urban areas are overwhelmed. *See* Br. of *Amici Curiae* N.Y. State Bar Ass'n, *et al.*, at 19-21. And the alleged freedom to establish Legal Services affiliates to perform the forbidden legal tasks with non-federal funds is not a realistic alternative in most communities because it requires the immensely wasteful establishment of a "physically separate" facility that has proven to be beyond the means of virtually every Legal Services program. *See infra* n.41.

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30. LSC concedes that the so-called deflection to another lawyer will often take place long into the case when the need to raise forbidden arguments becomes apparent. Br. of LSC at 7 n.4.

Stripped of the semantic, formalistic and factually inaccurate defenses advanced by petitioners, Congress's attempt to bar Legal Services lawyers from challenging the legal *status quo* in welfare cases stands as starkly violative of the First Amendment. Without First Amendment protection, an indigent client would be in the untenable position of seeking help against the government from lawyers programmed to say and do only what the government wishes. The provision of such "tame" counsel is more consistent with totalitarianism than it is with our commitment to Equal Justice Under Law.[31]

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31. Congress's attempt to deprive Legal Services lawyers of the ability to challenge the legal *status quo* on behalf of an indigent client is also a blatant denial of equal protection of the laws in violation of the Fifth Amendment. *Cf. James v. Strange*, 407 U.S. 128 (1972) (invalidating recoupment statute that treated indigent defendant more harshly than other civil judgment debtors); *Tate v. Short*, 401 U.S. 395 (1971) (invalidating statute that imposed prison term only on indigents who could not afford fines). *See* Roth, *supra*, 33 Harv. Civ. Rts.-Civ. Lib. L. Rev. at 144-56. If Congress were to provide that the burden of proof in civil cases varied with the income of the litigants, the statute could not survive constitutional scrutiny. In this case, Congress has provided that classic legal arguments readily available to any paying client will not be available to those indigent clients who must rely upon government-funded counsel. The net result is an irrational system of justice where the quality of legal representation is linked by law to a litigant's pocketbook. Such a result cannot survive any level of equal protection scrutiny. *See Romer v. Evans*, 517 U.S. 620, 635 (1996) (" '[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment. . . .' ") (quoting *Civil Rights Cases*, 109 U.S. 3, 24 (1883)).

II.

PETITIONERS HAVE UNCONSTITUTIONALLY INTERFERED WITH THE USE OF NON-FEDERAL FUNDS TO ADVANCE "PROHIBITED" LEGAL ARGUMENTS ON BEHALF OF INDIGENT CLIENTS

The fact that Congress's welfare challenge restriction applies even to legal assistance that LSC fund recipients provide using non-federal funds is also offensive to the First Amendment under *League of Women Voters*, 468 U.S. 364, for two reasons.[32] First, Congress could not have been clearer about its intention to impose an absolute bar on subsidy recipients' use of non-federal funds to challenge the legal *status quo* in welfare cases. LSC's unauthorized regulation purporting to allow recipients to use non-federal funds to raise forbidden arguments by utilizing physically separate "affiliate" organizations, *see* 45 C.F.R. § 1610.8,[33] should be disregarded, and Congress's blanket ban on such use of non-federal funds should be declared invalid under *League of Women Voters*.

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32. The constitutionality of LSC's restrictions on the use of non-federal funds is properly before the Court. This Court's grant of certiorari on the validity of the welfare challenge provision necessarily encompasses the provision's validity as it applies to restrict the use of both federal and non-federal resources to advance forbidden arguments. SUP. CT. R. 14(1)(a) ("[T]he question presented will be deemed to comprise every subsidiary question fairly included within."). Moreover, the challenge to the constitutionality of Congress's effort to ban the use of non-federal funds provides an alternative and less intrusive ground on which to affirm the decision below. *See Yee v. Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim."). The validity of applying the provision to non-federal funds was fully briefed and argued below.

33. LSC's regulations imposing the physical separation requirement are reproduced in LSC Cert. Pet.-App. at 131a-132a.

Second, even if LSC were authorized to promulgate a regulation permitting such use of non-federal funds, the regulation itself imposes an unconstitutional burden by requiring, without any plausible justification, that any lawyer seeking to advance forbidden arguments with non-federal funds must be housed in a wasteful and expensive "physically separate" facility.

A. Congress Has Flatly Banned the Use of Non-Federal Funds to Advance Forbidden Legal Arguments in Welfare Cases

Congress could not have been clearer in banning recipients of Legal Services funds from engaging in a list of prohibited lawyering activities — including the advancement of the forbidden arguments at issue here — even when those prohibited lawyering activities are financed entirely from non-federal sources. The plain language of the 1996 appropriations rider states:

> None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity (. . . referred to . . . as a 'recipient') [that engages in any of the prohibited activities listed in section 504(a)].

Pub L. 104-134, § 504(a), 110 Stat. at 1321-53.

The 1996 Congress authorized local recipients of Legal Services funds to accept supplemental non-federal funds, but explicitly forbade them from using the non-federal funds for any purpose that was prohibited under section 504(a) or the 1974 LSC Act. *See id.* § 504(d)(2)(B), 110 Stat. at 1321-56. In addition, Congress required that formal notice be given to all non-federal donors to a Legal Services program that their gifts were subject to the restrictions imposed by § 504(a) and the 1974 LSC Act. *See id.* § 504(d)(1), 110 Stat. at 1321-56. Finally, the section-by-section analysis of the Senate bill that

became the 1996 Act expressly states: "The legislation prohibits the use of alternative corporations to avoid or evade the provisions of the law." S. Rep. No. 104-392, at 26 (1996).[34]

LSC initially read the 1996 restrictions consistently with the plain meaning of Congress's text. In the period immediately following the enactment of the restrictions, LSC promulgated two successive sets of implementing regulations recognizing that Congress had banned the use of non-federal funds to engage in prohibited lawyering activities. *See* 61 Fed. Reg. 63,749, 63,749 (1996) ("many of the new statutory conditions effectively restrict a recipient's non-LSC funds to the same degree as they restrict a recipient's LSC funds"); 61 Fed. Reg. 41,960, 41,962 (1996) ("A recipient may not use non-LSC funds for any purpose prohibited by the LSC Act or for any activity prohibited by or inconsistent with section 504, unless such use is authorized by [provisions not relevant here]").

LSC's initial reading of the statute underwent a radical transformation in the face of litigation making it clear that Congress's attempt to bar the use of non-federal funds to engage in First Amendment activity was flatly unconstitutional under *League of Women Voters*. After two courts had explicitly ruled Congress's ban unconstitutional

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34. The 1996 Congress was obviously attempting to end the practice, in effect since 1974, of allowing local Legal Services offices to provide prohibited categories of representation using non-federal resources. Moreover, in mandating the blanket ban, Congress was legislating against the backdrop of LSC's long-standing accounting practice of treating "interrelated organizations" as one and the same in order to guard against recipients' manipulating corporate forms to evade requirements of the LSC Act. *See* 50 Fed. Reg. 49,276, 49,279-80 (1985) ("Funds held by an organization which controls, or is controlled by, or is subject to common control with, a recipient or subrecipient, are subject to the same restrictions as if the funds were held by the recipient or subrecipient.").

because it improperly sought to bar the use of non-federal funds,[35] and after the District Court below had expressed strong doubts about the ban's constitutionality at oral argument, LSC suddenly "discovered" an ambiguity in Congress's text that permitted the promulgation of yet a third, and then a fourth set of regulations purporting to authorize federally funded Legal Services programs to use non-federal funds to advance otherwise forbidden legal arguments — but only if the Legal Services lawyer advancing the forbidden argument was employed in a duplicative "independent" legal program housed in an enormously wasteful "physically separate" facility. 45 C.F.R. § 1610.8(a)(3).[36]

As respondents explain *infra*, the last-ditch attempt by LSC to salvage Congress's handiwork on the fly is itself violative of the First Amendment. It is not necessary, however, to consider whether LSC's effort to save the statute is itself a violation of the First Amendment because where, as here, Congress has unequivocally expressed an intention to condition federal funds on a waiver of the right to use non-federal funds to advance First Amendment activities, the unconstitutional statute may not be resuscitated by an administrative effort to rewrite it.[37]

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35. *Varshavsky v. Perales*, No. 40767/91 (App. at 6a-31a); *Legal Aid Soc'y of Haw.*, 961 F. Supp. 1402.

36. While the LSC regulation suggests that the degree of physical separation required "will be determined on a case-by-case basis," 45 C.F.R. § 1610.8(a)(3), LSC's practice demonstrates that the requirement is absolute. In the only known effort to establish a separately incorporated legal program to use non-federal funds for forbidden purposes without undergoing the expense of establishing a "physically separate" facility, LSC denied a request by Queens Legal Services to establish an affiliate that would share its physical space but in all other respects act as an independent program. *See* JA 82-95.

37. *Rust* teaches that when Congress wishes to authorize the use of separate programs to ensure that federal funds are not used for prohibited activities, Congress knows how to do so. In the Title X family

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The lower courts strained to uphold LSC's "new" reading of the statute under a combination of *Chevron* deference and the canon of constitutional avoidance. LSC Cert. Pet. – App. at 11a-13a; *id.* at 71a-75a. But, under *Chevron v. Natural Resources Defense Council*, courts "must reject administrative constructions which are contrary to clear congressional intent." 467 U.S. 837, 843 n.9 (1984). Moreover, neither agencies nor courts are "free to redraft statutory schemes in ways not anticipated by Congress solely to avoid constitutional difficulties." *Lowe*, 472 U.S. at 213 (White, J., concurring). *See Finley*, 524 U.S. at 590 (Scalia, J., concurring in judgment) ("[An Act of Congress] must be evaluated as written, rather than as distorted by the agency it was meant to control."); *Miller v. French*, 2000 WL 775572, at *8 (U.S. June 19, 2000) ("We cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.") (internal quotation marks & citation omitted). Thus, LSC's current regulation is invalid because it "materially deviates from the legislative plan" that it purports to implement. *See Lowe*, 472 U.S. at 213.[38] Deprived of its unauthorized administrative camouflage, Congress's flat ban on the use of non-federal funds clearly violates the First Amendment.

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planning program at issue in *Rust*, Congress explicitly distinguished between "projects" and "grantees," and the restrictions challenged in *Rust* applied only to the former. *See* 500 U.S. at 196. There is no attempt to make such a distinction in the 1996 appropriations rider, which is explicitly aimed at LSC fund "recipients." In fact, the *Rust* Court noted that the term "recipient" is associated with efforts to impose unconstitutional conditions on the receipt of government funds. *Id.* LSC is, thus, in the legally untenable position of attempting to replicate the *Rust* regulations, but without the *Rust* statutory authorization.

38. It is, therefore, unnecessary to decide whether LSC, an independent corporation, is entitled to *Chevron* deference, or whether regulations that are so obviously designed for strategic litigation purposes are entitled to *Chevron* deference.

B. LSC Has Placed Unconstitutionally Onerous Conditions on the Use of Non-Federal Funds

While LSC's "final" regulation is statutorily unauthorized and should be disregarded, even on its own terms the regulation violates the First Amendment because it imposes a significant economic burden on respondents' ability to use non-federal funds to advance forbidden legal arguments without any plausible government justification. *See Playboy*, 120 S. Ct. at 1886 ("The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.").[39] That LSC's requirement of maintaining physically separate facilities in order to use non-federal funds imposes a significant economic burden on the use of non-federal funds is beyond question. In order to use non-federal funds to advance a forbidden legal argument, financially strapped Legal Services programs must, at a minimum, duplicate library resources, word processing systems, and copying machines. And the economic burdens do not end with costly replication of physical equipment. Establishing an independent "physically separate" facility almost always entails a significant net increase in rent and utility payments,

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39. A private donor's effort to provide the poor with adequate legal representation by contributing funds to a local entity that also receives funds from LSC is unquestionably protected by the First Amendment. *Cf. Riley v. National Fed'n of the Blind of N.C.*, 487 U.S. 781 (1988) (invalidating restrictions on charitable fund-raising); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) (invalidating $250 limit on contributions in referendum campaign); *Buckley v. Valeo*, 424 U.S. at 21 (recognizing that campaign contributions are a form of constitutionally protected speech and association). State and local governments are equally entitled under the Tenth Amendment to expend funds for such purposes without federal interference.

as well as supervisory, legal, and administrative costs.[40] Moreover, shuttling part-time lawyers between physically separate facilities based on the legal arguments they happen to be thinking about is an administrative nightmare worthy of a Marx Brothers skit. Not surprisingly, in the several years that the "physically separate" option has been open to Legal Services programs, counsel is aware of just two Legal Services programs that have established such "physically separate" affiliate offices.[41]

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40. LSC's physical separation requirement similarly forces other funders of legal services to waste their scarce resources by funding separate and duplicative programs. For example, the mission of *amicus* the Oregon State Bar, which distributes state court filing fees to finance legal services programs in that state, is to ensure that those programs "provide high quality representation to all low-income Oregonians in the most cost-effective and efficient manner possible," *see* Br. of *Amici Curiae* N.Y. State Bar Ass'n, *et al.*, at 29-30 — an aim that is in tension with the physicial separation requirement.

41. The two programs are Piedmont Legal Services in Virginia, and Legal Aid Services of Oregon. The District Court had directed LSC to provide respondents' counsel with continuing discovery of all applications, successful and unsuccessful, seeking to establish "physically separate" affiliates. LSC initially identified Piedmont Legal Services as having won approval of an affiliate relationship with the Charlottesville-Albemarle Legal Aid Society; respondents, through independent research, identified a second affiliate relationship, between Legal Aid Services of Oregon and the Oregon Law Center. Attorneys in these programs have described substantial costs incurred as a consequence of LSC's physical separation requirement. *See* David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia, and Oregon Describe the Costs*, 17 Yale L. & Pol'y Rev. 337, 351-54 (1997). LSC also identified Alaska Legal Services and a few other programs as having established affiliate relationships, however the Alaska affiliate appears to be not a legal services program, but rather a case referral service staffed by non-lawyers that attempts to refer restricted cases to pro bono counsel; the other programs identified by LSC similarly do not appear to be engaged in separate affiliate relationships with legal services programs. LSC has asserted that other

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In both *Taxation with Representation* and *League of Women Voters,* this Court stressed that Congress may not unduly interfere with the ability of a subsidized speaker to use non-federal funds to pursue First Amendment activities. In *Taxation with Representation*, the requirement of establishing a legally separate affiliate to utilize the non-federal funds was deemed an adequate mechanism, but the Court warned that imposition of additional controls beyond bookkeeping separation "would negate the saving effect of [the separate affiliate avenue]" and pose intolerable burdens on the "constitutional right [of such organizations] to speak and to petition the Government." 461 U.S. at 553.[42] Similarly, in *League of Women Voters*, this Court reiterated that the First Amendment guarantees recipients of restricted federal subsidies the right to use non-federal funds to fill gaps in congressional First Amendment funding. While allowing that such speech can be required to be channeled through a

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physically separate affiliate relationships may exist without LSC's consent or knowledge, *see* Letter from Stephen A. Wieder to David S. Udell (July 12, 2000) ("LSC does not maintain records concerning the number of such [affiliate] relationships that have been established"), however respondents' counsel have been unable independently to verify the existence of any additional such relationships. LSC's website states that it currently funds 237 programs.

42. The particular activity at issue in *Taxation with Representation* was lobbying. Congress had elected to permit certain tax-exempt veterans' groups to use tax deductible contributions (a form of federal subsidy) for lobbying, but not to allow other tax-exempt groups (those organized under section 501(c)(3) of the Internal Revenue Code (IRC)) to do so. In rejecting a challenge to this policy, this Court stressed the ease with which the complaining groups could form tax exempt affiliates under IRC section 501(c)(4) to use non-tax-deductible resources to lobby. The Court underscored that this separation requirement was merely "to show that tax deductible contributions are not used to pay for lobbying," 461 U.S. at 553, and warned that imposition of additional restrictions on the affiliates would amount to an unconstitutional condition. *See id.*

separate affiliate in order to ensure that no improper cost was borne by the restricted federal funds, the Court did not countenance any requirement of physical separation.[43] Thus, in both *Taxation with Representation* and *League of Women Voters*, the economic cost of separating federal from non-federal funds was minimal. In *Rust*, however, the government upped the ante by requiring that federally subsidized family planning clinics wishing to use non-federal funds to counsel patients about abortion must establish two physical facilities, one for federal purposes, and one for non-federal purposes, in order to ensure fiscal integrity, public understanding and program integrity. 500 U.S. at 180. This Court upheld the requirement. *Id.* at 198.

Rust is the only decision of this Court upholding a requirement that expensive, "physically separate" facilities be maintained in order to take advantage of the First Amendment rights recognized in *League of Women Voters*. *Rust* holds that where separate physical facilities are shown to be necessary to preserve the fiscal integrity of the federal program or to prevent public confusion about who sponsors a particular program, a requirement of physical separation may be justified, despite the economic burden it imposes on the use of non-federal funds. *Rust* does not stand, however, for the proposition that physical separation can be mandated, despite its burden on First Amendment rights, in the absence of a plausible government justification. No such justification is present in this case.

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43. At issue in *League of Women Voters* was a Federal Communications Commission rule barring public television stations that accepted federal subsidies from editorializing. The Court stressed that, absent creation of an avenue permitting station management to engage in editorial speech using the station broadcast equipment (*i.e.*, no physical separation) but financed with non-federal funds, the restriction violated the management's First Amendment right to speak using those non-federal resources. 468 U.S. at 400-01.

Petitioners overlook three fundamental distinctions between this case and *Rust*. First, unlike *Rust*, the District Court explicitly found that it was unnecessary to require a "physical separate" facility to ensure that federal LSC funds are not used to subsidize restricted activities. The District Court found (and petitioners have never challenged this finding) that the long-standing requirement that Legal Services lawyers maintain careful time records, coupled with a requirement of accurate accounting principles covering both fixed and variable costs, would ensure that federal funds are not used to subsidize forbidden activities. *See* LSC Cert. Pet.-App. at 73a ("[T]here would be no need to restrict the use of non-LSC funds at all" if LSC merely sought to ensure proper use of federal funds) (985 F. Supp. at 339).

Instead, the courts below found that the regulations' separation requirement was intended by LSC to prevent public confusion over whether the federal government was "endorsing" the activities of Legal Services lawyers. However, unlike *Rust*, there is no risk at all that the public will confuse federal government funding of litigation against itself with federal endorsement. The only possible justification for a physical separation requirement arises where (as in *Rust*) a government speaker desires to distinguish its own speech from the speech of private parties communicating messages that the government speaker does not endorse. But in programs where the government is not the "speaker," this concern dissolves into nothing more than government concern about perceived "endorsement." This Court has repeatedly evinced a healthy skepticism when fear of government endorsement is deployed as an excuse for censorship.[44] Indeed, the Court flatly rejected precisely such concerns of perceived endorsement in *Rosenberger*, 515 U.S. at 841-42.

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44. *See*, e.g., *Capitol Square Review & Advisory Bd.*, 515 U.S. at 769; *Turner Broadcasting Co. v. FCC*, 512 U.S. 622, 655 (1994); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980).

Moreover, the unsubsidized activity at issue in this case — suing the government because it has allegedly acted unlawfully — loudly proclaims that the government disagrees with it. A plausible risk of confusion over federal endorsement can hardly exist when Legal Services lawyers are actually suing the government. *Cf. Polk County*, 454 U.S. at 321-22 & n.13 (holding that public defenders could not be regarded as acting under color of state law, when they are adversaries of the state).

Finally, unlike *Rust*, there is no substantive tension between the subsidized and non-subsidized activities at issue in this case. In *Rust*, the two activities were mutually inconsistent. In the government's eyes at least, discussion of abortion in *Rust* actually negated the government's preferred approach to family planning. In this case, however the non-subsidized activity is merely a logical extension of the subsidized activity. Indeed, unlike *Rust*, the non-subsidized activity in this case actually complements and enriches the subsidized activity. *Cf. Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring in part & concurring in judgment) (federal policy should preempt others only where policies are "irreconcilable" and conflict is unavoidable, not "hypothetical or potential").

Unlike *Rust*, therefore, petitioners are unable to assert a single plausible justification for conditioning the use of non-federal funds on the burdensome physical separation requirement. Under traditional First Amendment analysis, such an onerous burden on First Amendment activities must: (1) advance an extremely important governmental interest, *see, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994) (finding an asserted interest valid but not compelling); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Schneider v. State*, 308 U.S. 147 (1939); (2) be no more extensive than necessary to advance the government's interest, *see Playboy*,

120 S. Ct. at 1886; *Reno v. ACLU*, 521 U.S. 844, 874-75 (1997); *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989); and (3) refrain from vesting government officials with undue discretion over the right to engage in First Amendment activities, *see City of Lakewood*, 486 U.S. at 771; *Shuttlesworth*, 394 U.S. at 153. LSC's final regulations fail all three tests.

Since the physical separation requirement is supported by no significant government justification; goes farther than necessary to meet the only legitimate justification — ensuring that government funds are not used for unauthorized purposes; and vests total discretion in LSC to implement the requirement, *see* 45 C.F.R. § 1610.8(a)(3) (degree of physical separation required "will be determined on a case-by-case basis"), no basis exists for the imposition of a severe economic burden on the use of non-federal funds to provide a full spectrum of legal representation to the poor.[45]

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45. Petitioners mischaracterize respondents' challenge to LSC's regulation as a "facial" challenge. *See, e.g.*, Br. of U.S. at 29. In fact, each respondent argues that the challenged restrictions are invalid as applied to her, and seeks to raise her own rights, not the rights of third persons. *Compare City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) ("When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question."). Ms. Velazquez lost her Legal Services lawyer (and her welfare benefits) because a Bronx Legal Services lawyer was not permitted to use available federal and non-federal resources to advance a forbidden argument on her behalf. Each LSC lawyer-respondent practices under an unconstitutional disability every day, barred from raising forbidden arguments. And each donor-respondent challenges the unjustifiable economic burden that LSC's restrictions impose on their respective donations. The Court below ruled that despite the classic "as applied" nature of respondents' challenge, the constitutionality of the LSC regulation requiring separate physical facilities should not be decided in the absence of a program-by-program showing that it is unduly burdensome. LSC Cert. Pet.-App. at 19a-20a. With respect, such an approach ignores settled First Amendment

(Cont'd)

III.

CONGRESS MAY NOT INTERFERE WITH THE DECISIONAL AUTONOMY OF THE JUDICIARY BY PREVENTING LEGAL SERVICES LAWYERS FROM ADVANCING DISFAVORED LEGAL ARGUMENTS

As early as *Marbury v. Madison*, this Court made clear that Congress cannot do what it did here: authorize Legal Services lawyers to help implement welfare laws by representing indigent litigants in court, and simultaneously forbid them from arguing that the new rules are invalid. In that case, the Court asked, "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect?" 5 U.S. (1 Cranch) at 178. Declaring this hypothetical

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(Cont'd)
precedent holding that where a government regulation imposes a significant economic burden on protected speech, the government must, as a threshold matter, demonstrate an interest of sufficient magnitude to justify the burden. *See, e.g., Playboy*, 120 S. Ct. at 1886; *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996); *Colorado Repub. Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996). Until the government proffers such an interest, it is plain error to require a speaker to demonstrate an undue burden. Moreover, regardless of the resources available to a particular Legal Services program, it is *always* the case that the physical separation requirement imposes a wasteful and constitutionally unjustifiable burden. Finally, even if this case were a facial challenge where plaintiffs sought to assert the rights of third-parties (which it is not), and even if plaintiffs' claims hinged (which they do not) on showing that most programs simply cannot afford to establish physically separate affiliates, it would make no difference. "To prevail [on a facial challenge], respondents [need only] demonstrate a substantial risk that application of the provision will lead to the suppression of speech." *Finley*, 524 U.S. at 580. *See Planned Parenthood v. Casey*, 505 U.S. 833, 895 (1992) (statute facially invalid as "substantial obstacle" to exercise of right in "large fraction" of cases). This standard is far exceeded where, as here, virtually no Legal Services programs have succeeded in establishing and maintaining physically separate affiliates.

to be "an absurdity too gross to be insisted on," Chief Justice Marshall ruled that the judicial department must have the power to determine "which of these conflicting rules governs the case." *Id.* Ever since, this Court has repeatedly recognized that fundamental principles of separation of powers preclude the political branches from tampering with judicial autonomy.[46] For example, in *United States v. Klein*, 80 U.S. (13 Wall.) 128, a litigant sought relief in a federal court in connection with assets that had been seized and sold as rebel property by agents of the federal government during the Civil War. In support of his application to be relieved from the consequences of the seizure, the litigant proffered a Presidential pardon as evidence of loyalty to the United States. Congress thereupon enacted a statute forbidding the courts from viewing a Presidential pardon as evidence of loyalty, directing, instead, that Article III judges view a Presidential pardon as evidence of disloyal activity. *Compare United States v. Padelford*, 76 U.S. (9 Wall.) 531, 442-43 (1869) (ruling that Presidential pardons neutralized prior acts of disloyalty). In *Klein*, this Court invalidated the statute, holding that Congress was without power to attempt to control the decisional processes of an Article III judge. 80 U.S. (13 Wall.) at 145-47.

Similarly, in *Dickerson v. United States*, this Court held that 18 U.S.C. § 3501 constituted an impermissible congressional attempt to "legislatively supersede our decisions interpreting and applying the Constitution." 2000 WL 807223, at *6. *See also City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (invalidating the Religious Freedom Restoration Act on similar grounds). Taken together,

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46. The adjudicatory autonomy of Article III Courts is protected by fundamental principles of separation of powers, as well as the Due Process Clause of the Fifth Amendment. The adjudicatory autonomy of state courts is protected against federal encroachment by the Tenth Amendment and the Due Process Clause of the Fourteenth Amendment. The protections are functionally identical.

Marbury, *Klein* and *Dickerson* stand for an important principle: Congress may not seek to influence the outcome of pending cases by dictating the decisional process, superseding this Court's constitutional jurisprudence or, as here, manipulating the result by controlling the flow of information and argument to the courts.

Petitioners argue that Congress's ban does not interfere with the judiciary because other, non-federally funded lawyers are available to advance arguments challenging the legal *status quo*. But not only is such counsel simply non-existent in many states, *see* Br. of *Amici Curiae* N.Y. State Bar Ass'n, *et al.*, at 18-25, but, in the real world, the practice of law is not amenable to such arbitrary compartmentalization, *see* discussion *supra* pages 24-26. Moreover, even if non-federally funded lawyers were available in larger numbers, their existence would not render Congress's restriction constitutional. If, for example, Congress, motivated by a desire to shield its legislation from challenge, provided that one half of all lawyers were forbidden to raise constitutional arguments in court, the fact that the other half remained free to do so would not alter the reality that the flow of argument and information to the judiciary in particular cases had been materially impeded. In this case, Congress has taken 95 percent of the available lawyers for poor Americans "out of the game" in an unalloyed effort to shield its legal viewpoints from challenge. To argue that the judiciary is nonetheless unaffected because the few remaining available lawyers are still free to raise forbidden constitutional arguments in other cases borders on the absurd.

IV.

THE TEXT OF THE 1974 LSC ACT SHOULD BE READ HARMONIOUSLY WITH THE 1996 APPROPRIATIONS RIDER TO PERMIT A LEGAL SERVICES LAWYER TO ADVANCE FORBIDDEN ARGUMENTS WHEN NECESSARY TO AVOID THE POSSIBLE COMMISSION OF AN ETHICAL VIOLATION

The serious constitutional issues raised in this case can be ameliorated, if not entirely avoided, by a proper reading of the relationship between the text of the LSC Act of 1974 and the 1996 appropriations rider before this Court. The 1996 rider authorizes Legal Services lawyers to represent indigent litigants in welfare cases, but purports to forbid the lawyers from challenging the constitutionality or the statutory legality of any welfare reform statute or regulation. Such a prohibition is in clear tension with the "high standards of the legal profession" and "protection of the adversary process from any impairment" repeatedly mandated of Legal Services lawyers by the text of the 1974 Act. *See* 42 U.S.C. §§ 2996(6), 2996e(b)(3), 2996f(a)(1) (reproduced *infra* in App. at 1a-2a.).

Petitioners urge two unsatisfactory ways of resolving this tension. First, they argue that the 1996 appropriations rider need not be in tension with a commitment to the highest standards of legal ethics because in order to steer clear of any case in which the 1996 prohibition would raise ethical problems, Legal Services lawyers may refer the client to another lawyer who is not subject to the restrictions. But, as respondents have demonstrated, such an approach is premised on two unsupportable assumptions: (1) that non-LSC-funded lawyers are routinely available to provide effective representation to indigent clients; and (2) that the necessity of raising a forbidden argument will always be evident at the initiation of the attorney-client relationship. As Ms. Velazquez's experience demonstrates, in most communities

in the United States, if a Legal Services lawyer is unable to accept a welfare case because the 1996 restrictions render it impossible to do so, the indigent client has nowhere else to go. *See* Br. of *Amici Curiae* N.Y. State Bar Ass'n, *et al.*, at 18-25. That in itself poses an intractable ethical dilemma: Should the Legal Services lawyer accept the client and do the best that can be done under the existing restrictions? Should the Legal Services lawyer decline to accept the client, knowing that there is nowhere else to turn? Or should the Legal Services lawyer accept the client, ignore the restrictions, and risk the cessation of federal funding, thus jeopardizing the existence of counsel for other indigent clients served by the program? Suffice it to say that there is no easy answer to such an ethical dilemma.[47]

Petitioners' second suggested method of resolving the tension is even less acceptable. Since, argue petitioners, the 1996 appropriations rider is undeniably later in time than the 1974 ethical mandates in the body of the statute, the 1996 restrictions must override any ethical dilemmas, requiring Legal Services lawyers to act in tension with, if not in direct contravention of, "the high standards of the profession." But such a wooden application of the last-in-time doctrine is a wholly inappropriate way to read the complex interplay between the basic provisions of a congressional statute and subsequent restrictions imposed by the appropriations rider.

A far preferable way to resolve the tension is to ask whether the appropriations rider manifests an unmistakable intention to override a fundamental precept of the original statute. If it does, that intention must, of course, be respected,

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47. While an American Bar Association ethics opinion offers guidance for attorneys facing this ethical dilemma, *see* ABA Comm. on Ethics and Prof. Resp., Formal Op. 96-399 (1996), the opinion assumes that this collision is inevitable. Its authors would readily agree that a statutory construction enabling lawyers to avoid facing this dilemma would be vastly preferable.

despite the highly undesirable practice of using appropriations riders to enact substantive legislation. Where, however, as here, Congress does not manifest such an unmistakable intention, the two provisions should be read together in an effort to give meaning to both exercises of congressional will. In the absence of an explicit congressional desire to mandate activity that is, at a minimum, in tension with traditional ethical norms,[48] it is simply wrong to ascribe to Congress such an intention. *Traynor v. Turnage*, 485 U.S. 535, 547-49 (1988) (where statutory policy is long-standing, Court is loathe to infer congressional intent to repeal unless unmistakably clear). Instead, the interplay between the two provisions should be read to require Legal Services lawyers to attempt to avoid making the forbidden arguments by shifting the case to substitute counsel, if possible; but to recognize a narrow "ethical override" permitting Legal Services lawyers to advance the forbidden arguments when no ethically acceptable alternative exists. Such a reading is consistent with both the canon of constitutional avoidance, and with this Court's precedents construing the effect of appropriations riders on statutory text. *See TVA v. Hill*, 437 U.S. 153, 190 (1978).

CONCLUSION

For the above-cited reasons, the decision of the United States Court of Appeals for the Second Circuit on the issue before the Court should be affirmed.

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48. Elsewhere in the rider, where Congress intended to override other conflicting provisions of the 1974 Act, it stated so expressly. *See, e.g.*, Pub. L. No. 104-134, §§ 504(a)(10)(C), 509(h) ("Notwithstanding section . . .").

Respectfully submitted,

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APPENDIX

APPENDIX A — RELEVANT STATUTES

1. Legal Services Corporation Act of 1974, as amended, Pub. L. No. 93-355, § 1001(6), 42 U.S.C. § 2996, provides in relevant part:

> Congressional findings and declaration of purpose
>
> The Congress finds and declares that —
>
> * * *
>
> (6) attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession.
>
> * * *

2. Legal Services Corporation Act of 1974, as amended, Pub. L. No. 93-355, § 1006(a)(3), 42 U.S.C. § 2996e(b), provides in relevant part:

> (3) The Corporation shall not, under any provision of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility . . . or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such

jurisdiction. The Corporation shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities.

* * *

3. Legal Services Corporation Act of 1974, as amended, Pub. L. No., 93-355, § 1007(a)(1), 42 U.S.C. § 2996f, provides in relevant part:

Grants and contracts.

(a) Requisites

With respect to grants or contracts in connection with the provision of legal assistance to eligible clients under this subchapter, the Corporation shall —

(1) insure the maintenance of the highest quality of service and professional standards, the preservation of attorney-client relationships, and the protection of the integrity of the adversary process from any impairment in furnishing legal assistance to eligible clients.

* * *

APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAFAYETTE-OPELOUSAS DIVISION IN *DUGAS, et al. v. HOFFPAUIR, et al.*, CIVIL ACTION NO. 6:93-1699, DATED AND FILED OCTOBER 24, 1996

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Civil Action No. 6:93-1699

Judge Tucker L. Melançon
Magistrate Judge Mildred E. Methvin

Vicki Dugas, et al

versus

Kay Hoffpauir, et al

MEMORANDUM ORDER

A ruling was entered on February 14, 1996 granting the plaintiffs' motion for class action certification. On July 10, 1996, attorneys for the plaintiffs moved to withdraw as counsel of record. A telephone conference was conducted by this Court on July 31, 1996, at which time the Court denied the motion to withdraw based on the condition that the matter be stayed until September 30, 1996, or until new counsel enrolls; that the attorneys addressed in the motion be allowed to withdraw on September 30, 1996; and that if new counsel for the plaintiffs did not enroll by September 30, 1996, the

remaining attorneys were to inform the Court of their ability to adequately represent the class.

A supplemental motion for named attorneys for plaintiffs to withdraw as counsel of record was filed on August 26, 1996. Based on the representation in that motion that the attorneys from the Legal Services Corporation would lose their federal funding if they continued as counsel of record and that the attorneys, although withdrawn, would continue to seek counsel to represent the plaintiffs by the September 30, 1996 deadline, the Court granted the motion on August 28, 1996.

On September 30, 1996, the attorneys for the plaintiffs filed a motion to extend the time in which to enroll new counsel. The Court denied that motion on October 2, 1996, and gave the remaining counsel for plaintiffs until noon on October 7, 1996, to inform the Court of their ability to adequately represent the class. As requested, the remaining counsel for the plaintiffs notified the Court that they could not adequately represent the entire class.

Based on representation made to the Court by Ms. Esther Lardent of the American Bar Association Law Firm Pro Bono Project, that law firms could represent the entire class has been contacted and expressed interest in taking the case, the Court granted the plaintiffs an additional fourteen days in which to enroll counsel that could adequately represent the entire class on October 9, 1996.

The plaintiffs having failed to enroll additional counsel, and based on the representations of remaining counsel for

the plaintiffs that present counsel is unable to adequately represent the class,

IT IS ORDERED that the class is decertified.

Thus done and signed this 2 day of October, 1996, at Monroe, Louisiana.

/S/
Tucker L. Melançon
United States District Judge

APPENDIX C — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE COUNTY OF NEW YORK IN *VARSHAVSKY, et al. v. GELLER, et al.*, INDEX NO. 40767/91, DATED AND FILED DECEMBER 24, 1996

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 40767/91

BASYA VARSHAVSKY, BARBARA SCOTT, JANE DOE, and EMILY HEMMERLING on behalf of themselves and all others similarly situated,

Plaintiffs,

– against –

ESTELLE GELLER, SYLVIA LEWIS and FLORENCE FINK, ANNA GRZESLO, DONALD KELLER, THOMASINA WHEELER, DOROTHEA PERLEY, DOROTHY NAZANITZKY and AGNES TRINKWALDER, on behalf of themselves and all others similarly situated,

Intervenors,

– against –

CESAR PERALES, as Commissioner of the New York State Department of Social Services, and MARK LACIVITA, as Acting Asst. Director of New York State Department of Social Services Office of Fair Hearing Administration,

Defendants.

Appendix C

Beverly S. Cohen, J.

This motion brings up for review federal statutes passed this year which are directed to the activities of the Legal Services Corporation established by Congress to provide legal services for the poor. The federal statutes challenged are part of the recent Congressional efforts to trim the federal deficit by cutting government spending, with the burden falling in this instance on those who can least afford it and those who represent them.

At issue are new federal restrictions placed on the Legal Services Corporation ("LSC") that mandated, as a condition for continued federal funding, the withdrawal of their attorneys from all class action suits by August 1, 1996. The new restrictions apply to all recipients of LSC funds, including plaintiffs' attorneys in this class action, Legal Services for the Elderly ("LSE"). LSE represents the indigent, elderly population of New York City and receives one-third of its funding from LSC. LSE receives two thirds of its funds from non-federal sources; New York State and private donors. LSE's failure to abide by the new restrictions would result in the withdrawal of federal funds not only from LSE, but from its parent office, Legal Services of New York City as well.[1]

The statutes do not restrict merely the right to use federal funds to engage in class actions and other specified activities, such as litigation concerning welfare benefits, prisoners'

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1. The United States Department of Justice has been notified of this motion, but has declined to take a position or to submit any papers.

rights, the census and abortions. They go much further. They prohibit recipients of federal funds from using private, state or local donations to engage in these activities. And they prohibit recipients from transferring their non-federal funds to any person or entity who does not abide by the same restrictions.

Valerie Bogart, Esq., a staff attorney from LSE, moves conditionally for leave to withdraw as counsel for the certified plaintiff class pursuant to C.P.L.R. Section 321, and/or asks for a temporary order clarifying her status as class counsel. The motion is conditional because Ms. Bogart wishes the court to decide whether her withdrawal is required under the Consolidated Rescissions and Appropriations Act of 1996, Pub. Law 104-134, 110 U.S. Stat. 1321 ("the 1996 Act") and its 1997 successor, Pub. Law 104-208, 110 Stat. 3009 ("the 1997 Act," the 1996 Act and the 1997 Act will be collectively referred to as "the Acts") and the rules promulgated thereunder by the LSC; whether her withdrawal is permissible under the New York State Code of Professional Responsibility; or whether the Acts and Rules are unenforceable because they violate the United States Constitution. Ms. Bogart wishes to remain as class counsel if the court finds that her withdrawal is unnecessary or unethical, or if the Acts and Rules violate the Constitution. Thus, this court must decide whether the ban on participation by LSC and its recipients in class actions, even where supported by non-federal funds, is constitutional.

Since its commencement in 1991, Ms. Bogart has served as lead counsel in this class action challenging the New York State Department of Social Services's abolition of its

In-Home Administrative Hearing Program. That program was closely tailored to serve the needs of those elderly homebound persons who were too disabled to travel to the departmental office to attend their benefits hearings. After class certification in 1991, this court entered a preliminary injunction in 1992, requiring defendants to provide initial telephone, and, if necessary, in-home hearings before terminating public assistance or Medicaid payments to homebound members of the plaintiff class. In 1994, the preliminary injunction was affirmed by the Appellate Division, First Department. [202 AD2d 155] At present, Ms. Bogart and her co-counsel Marc Cohan are engaged in monitoring Defendant's compliance with the preliminary injunction. No further legal proceedings have been held.

The 1996 Act provides that:

> None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity . . . that initiates or participates in a class action suit. [Subsection 504(a)(7)]

The restrictions also prohibit the acceptance of non-federal funds for use in class actions:

> The Legal Services corporation shall not accept any non-Federal funds and no recipient shall accept funds from any source other than the corporation, unless the corporation or the recipient, as the case may be, notifies in writing the source of the funds that the funds may not be

> expended for any purpose prohibited by the Legal Services Corporation Act or this title. [Subsection 504(d)(1)]

The LSC rules implementing the Act [45 CFR 1610 et seq., published 61 Fed. Reg 63749 and 45 CPR 1617 et seq, published in 61 Fed. Reg 63754, all published on December 2, 1996, hereinafter "the Rules"] extend these same restrictions even to third parties who receive non-LSC funds from LSC recipients. For example, were LSE to donate its non-federal funds to an independent organization or an affiliate that engages in class actions, LSE would lose its federal funding if the independent organization used those funds for class actions.

The rule entitled "Transfers of recipient funds" [45 CFR 1610.7 (published in 61 Fed. Reg. 63753, Dec. 2, 1996)] provides as follows:

> (a) For a transfer of LSC funds, the prohibitions and requirements referred to in this part . . . will apply both to the funds transferred and to the non-LSC funds of the person or entity.
>
> (b) For a transfer of non-LSC funds, the prohibitions and requirements referred to in this part . . . will apply to the funds transferred, but will not apply to the other non-LSC funds of the person or entity. . . .

"Non-LSC funds means any funds derived from a source other than the Corporation." [45 CFR 1610.2(d)] A "transfer"

is defined as "a transfer of a recipient's funds for the purpose of conducting programmatic activities that are normally conducted by the recipient, such as the representation of eligible clients. . . ." [45 CFR 1610.2(g)] An "[a]ctivity prohibited by or inconsistent with Section 504 means any activity prohibited or inconsistent with . . . (3) Section 504(a)(7) and 45 CFR part 1617 (Class Actions)" [45 CFR 1617.2(b)(3)]

Prior to the publication of the Rules in December of 1996, the LSC had promulgated interim rules on August 13, 1996. The interim rules provided as follows:

> (a) . . . *Class action* means a lawsuit filed as, or otherwise declared by the court having jurisdiction over the case to be, a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure or the comparable State statute or rule of civil procedure applicable in the court in which the action is filed.
>
> (b) *Initiating or participating in any class action* means any involvement at any stage of a class action *prior to an order granting relief* including acting as amicus curiae, co-counsel. . . . *It does not include non-adversarial monitoring of an order granting relief* or individual representation of a client seeking to obtain the benefit of relief ordered by the court. (emphasis added) [45 CFR 1617]

In an interim order dated August 1, 1996, this court directed Ms. Bogart to remain as counsel pending oral

argument of the motion. A second interim order, dated August 20, 1996, provided that because Ms. Bogart was engaged in non- adversarial monitoring of an order granting relief (the preliminary injunction) she was not participating in a class action as defined by LSC's interim rules. The second interim order further provided that Ms. Bogart was to remain as counsel for the plaintiff class absent a change in circumstances; that Ms. Bogart and the LSC should notify the court and all interested parties if there were a change of circumstances which might require Ms. Bogart to run afoul of the Acts and the interim rules; and that no adverse action was to be taken against Ms. Bogart, LSNY or LSE by LSC or Legal Services for New York City without notice to the court, to Ms. Bogart and her attorney, and an opportunity to respond. The second interim order directed that it be served on the Attorney General of the United States, and Richard Mathieu, Asst. New York State Attorney General, and set a schedule for the submission of opposition and additional supporting briefs.

As a result of Ms. Bogart's remaining as counsel, LSE received a letter, dated August 1, 1996, from LSNY stating that no LSC funds would be available to LSE after August 1, 1996 unless Ms. Bogart immediately withdrew.

In addition, on August 9, 1996, LSC acted to enforce the restrictions on class actions by making a "preliminary determination" that it would terminate the funding of LSNY on September 1, 1996, expressly based on the actions of the attorneys of LSE as class counsel in this and other class actions. As of December 1, 1996 no funding had been withdrawn.

Appendix C

On September 30, 1996, Congress enacted the 1997 Act containing identical restrictions on class actions. [Pub. Law 104-208, 110 Stat. 3009]

LSC'S final rule defining participation in a class action is effective January 1, 1997. [45 CFR 1617.2(b) published in Fed. Register on December 2, 1996 at 61 Fed. Reg. 63755, hereinafter referred to as "the Rule"] The Rule changes the definition of, and further limits, participation in a class action:

> (1) *Initiating or participating in any class action* means any involvement at any stage of a class action *prior to or after* an order granting relief. "Involvement" includes acting as amicus curiae, co-counsel or otherwise providing representation relating to a class action.
>
> (2) *Initiating or participating in any class action* does not include representation of an individual client seeking to withdraw from or opt out of a class or obtain the benefit of relief ordered by the court, or non-adversarial *activities*, including efforts to remain informed about, or to explain, clarify, educate or advise others about the terms of an order granting relief. [emphasis supplied]

The discussion appearing in the Federal Register explains the new language in the Rule:

> The definition of "initiating or participating in any class action" in the interim rule was

> intended to clarify that any involvement in a class action is prohibited prior to an order granting relief. . . . In general the Board decided that it should state in the rule that all participation, whether before or after entry of an order, is prohibited; and the final rule reflects that change. In addition, the Board decided to address some of the specific issues addressed by the comments.
>
> One comment urged the deletion of "non-adversarial" before "monitoring," stating that any action, even an adversarial action, should be allowed once an order granting relief has been issued. The Board did not take this approach. Participation in adversarial actions, even after entry of an order, constitutes active participation in a class action and such involvement is not permitted under the law. The use of the term "non-adversarial" was intentional. The Corporation meant to prohibit any adversarial action after relief is granted. . . . Furthermore, the term "monitoring" is replaced with "activities" because its use seemed to imply a more active role for recipients than was intended. [61 Fed. Reg. 63754]

In a letter dated December 9, 1996, Ms. Bogart informed the court that the rules had been changed and stated that although the regulation still appears to be ambiguous, "one reading of the regulation would make it impossible for me to continue as counsel in the current status of the case, in which I am continuing to monitor compliance with the

preliminary injunction." The court received a letter from LSC in response, which argues that the Rule is no different from the interim rule.

The court agrees that some of Ms. Bogart's monitoring activities may be regarded as adversarial under the broader sweep of the Rule. Monitoring includes making judgments about and enforcing compliance. Under the interim rules, the court held that Ms. Bogart's activities were permissible because they were limited to monitoring. However, the Rule, and particularly the discussion that accompanied it, indicate that the word "activities" was substituted for "monitoring" because "monitoring" seemed to imply a more active role for recipients than was intended. Thus only activities more passive than monitoring are permissible under the present Rule. Moreover, the interim rule was limited to activities prior to an order granting relief, whereas the Rule applies to activities after an order granting relief.

Ms. Bogart reports that her current activities include 1) monitoring of the "scheduling of in-home hearings and compliance with 'aid continuing' directives for individual class members;" 2) meeting "with the State about improving client notices used in the home hearing program, procedures and time frames for completing telephone hearings;" and 3) representing "some individual class members in their individual and administrative claims." [Bogart Aff., dated July 24, 1996, paras. 5 & 7] Ms. Bogart and the State are presently negotiating which in-home hearing issues do not contain a factual dispute so that a second hearing need not be scheduled and reviewing all hearing decisions that the State places in this category. [Id. at para. 13]

Appendix C

Ms. Bogart's representation of individual clients might well be described as adversarial activity since it involves making legal judgments about the State's compliance and negotiations about how the State should comply. Ms. Bogart seeks the aid of the court to avoid imperiling all funding for LSE and its parent organization.

Accordingly, it is necessary to finally determine Ms. Bogart's motions prior to the effective date of the Rules.

Ms. Bogart's argument that her withdrawal would violate the New York State Code of Professional Responsibility must be resolved first. "A fundamental and long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." [*Lyng v. Northwest Indian Cemetery Protective Assoc.*, 485 U.S. 439, 445]

The enabling statute which created the Legal Services Corporation, 42 U.S.C. 2996(6), provides that LSC shall not interfere with any attorney in honoring his/her professional responsibilities:

> attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession.

and

> The Corporation shall not, under any provision of this subchapter interfere with any attorney in

> carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association . . . or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction. The Corporation shall ensure that activities under this Subchapter are carried out in a manner consistent with attorneys' professional responsibility. [42 U.S.C. 2996e(b)(3)]

DR 2-110(C) provides that "a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse affect on the interests of the client. . . ."

Here, although Ms. Bogart's familiarity with this case would make it preferable for her to remain as counsel, it cannot be said that her withdrawal will be materially adverse to her clients. Ms. Bogart's co-counsel, Mr. Cohan, is ready and willing to take over. He is presently employed by The Center for Social Welfare Policy and Law (CSWP). This would allow him to remain as plaintiffs' counsel. (CSWP is not a recipient of LSC funds.) At oral argument it was conceded by Ms. Bogart's attorney that CSWP is in all respects able counsel to handle this matter. Neither can it be said that the restrictions are preventing Ms. Bogart from representing her client ethically because she cannot use the class action procedure. Ms. Bogart may withdraw so that counsel not subject to the restrictions can replace her.

Appendix C

The constitutional issues must be reached because the non-constitutional grounds supporting the motion would permit Ms. Bogart to withdraw.

In 1963, the Supreme Court held in *NAACP v. Button*, 371 US 415 (Brennan, J., writing for the majority), that citizens have a fundamental First Amendment right to engage in collective litigation to achieve political objectives:

> [A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. . . . In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930's, for example, no less is it true of the Negro minority today. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.
>
> We need not in order to find constitutional protection for the kind of cooperative,

> organizational activity disclosed by this record, whereby Negroes seek through lawful means to achieve legitimate political ends, subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activities. Thus we have affirmed the right 'to engage in association for the advancement of beliefs and ideas.'. . . .
>
> The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association. [Id. at pp.429-431]

In *NAACP v. Button*, the NAACP sued to restrain the enforcement of Virginia statutes that prohibited advocacy of litigation against the State and solicitation of clients by attorneys. The activities of the NAACP were educational and lobbying activities designed to encourage groups of black parents and their children to hire NAACP lawyers to bring litigation to fight school segregation.

The Virginia statutes were held unenforceable because litigation for the purpose of having a political impact, and to accomplish political change, was a constitutionally

privileged form of political expression that overrode the statutory ban on solicitation.

Five years later, in *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, the court overturned an injunction prohibiting a union from employing an attorney to represent union members on the ground that the union was engaged in the unauthorized practice of law. The Court held that "the freedom of speech, assembly and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis." [Id. at 221-222] The Court found that it was irrelevant that *NAACP v. Button* involved political litigation, whereas the mine workers' litigation concerned private interests, holding that:

> The litigation in question is, of course, not bound up with political matters of acute social moment, as in Button, but the First Amendment does not protect speech and assembly only to the extent that it can be characterized as political. 'Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and free press are not confined to any field of human interest.' [Id. at 223, quoting *Thomas v. Collins*, 323 US 516, 531]

In 1971, the Supreme Court reaffirmed "the First Amendment principle that groups can unite to assert their

legal rights as effectively and economically as practicable." [*United Transportation Union v. State Bar of Michigan*, 401 US 576, 580]

Legislation that limits First Amendment freedoms is valid only when justified by a compelling state interest and only when the legislation is the "least restrictive alternative" for achieving the legislative objective.

> [The Supreme Court has] consistently held that only a compelling state interest in the regulation . . . can justify the limiting of First Amendment freedoms. [*NAACP v. Button*, supra at 438; see also *NAACP v. Alabama*, 357 US 449, 460-461 ("state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."]

In striking down the Virginia statutes the Supreme Court in *NAACP v. Button* adopted a "narrow specificity" test for statutes that touch on First Amendment rights. The Court held that it was not necessary to find that privileged conduct was actually interfered with, but only that the statute could be used to interfere.

> [I]t does not follow that this Court now has only a clear-cut task to decide whether the activities of the petitioner deemed unlawful . . . are constitutionally privileged. If the line drawn by the decree between the permitted and prohibited activities of the NAACP, its member and lawyers is an ambiguous one, we will not presume that

> the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression. . . . Furthermore, the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. [Id. at 432-433; see also *In re Primus*, 436 US 412]

Here there is no justification for the ban on the use of non-federal funds for class action litigation, compelling, substantial, or rational. The ostensible goal of saving money will not be accomplished by relegating the poor to less efficient individual actions for the same relief.

The legislative history of the restriction on class action litigation challenged here reveals that the actual state interest in passing the legislation was a blatant attempt to inhibit the First Amendment rights of LSC lawyers, their clients and

anyone who agrees with them. The restrictions were designed to minimize, if not prevent, the political impact of the causes of the poor and their champions. The class action restriction served to insure that the poor, if they were to have counsel at all, would be relegated to counsel rendered less effective, or as Ms. Bogart's counsel has described it, a lawyer fighting with one hand behind her back.

For example, Senator Phil Gramm described the purpose of the Acts as follows:

> These restrictions will ensure that scarce resources available for this purpose are not diverted to costly class action or impact litigation, or to activities which promote a particular political agenda. [Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Bill, 1996, S. Report, 104-139, 1995 WL 548950, p. 98][2]

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2. Representative Taylor of North Carolina also decried LSC's "political agenda." [Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1997, 142 Cong. Rec. H8149-04, 1996 WL 410589, p. 133] Congressman Ballenger of North Carolina complained that "Legal Services has long been involved in political advocacy with tax dollars. . . . After years of abuse, the Corporation has become a place for attorneys to put forth their liberal agenda. . . ." [Id. at 140] Mr. Doolittle from Louisiana lamented that "[Legal Services] is an advocacy group for liberal causes. . . ." [Id. at 159] Mr. Schiff from New Mexico asserted that "unpopular individuals have brought unpopular lawsuits through the Legal Aid Society." [Id. at 163] Representative Weldon of Florida criticized LSC for "left wing liberal advocacy." [Id. at 164]

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Representative Dornan declared "It's time to defund the left. . . ." [Departments Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1997, 142 Cong. Rec. H8149-04, 1996 WL 410589, p. 185]

Under the Acts and the Rules, LSC recipients cannot accept donations unless they notify the donors that the money will be subject to the restrictions at issue here. The rule regarding transfers forbids recipient from transferring funds that never belonged to the federal government to a group with no connection to LSC, unless the transferee agrees to the restrictions.

This court does not need to reach the issue of whether the withdrawal of federal funding alone would violate the Constitution, as urged in Ms. Bogart's brief. The Acts and the Rules are invalid because they go beyond restricting the use of federal funds. This is not legislation that simply declines to fund a particular form of free expression. [See, e.g., *Rust v. Sullivan*, 500 US 173, pp. 196-197]. This legislation penalizes the LSC recipient for engaging in political expression that Congress disapproves of using funds wholly independent of the federal government, even if the recipient segregates those funds by giving them away.

In *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1982), the Supreme Court held that Congress,

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(Cont'd)
Congressman Longley of Maine was encouraged because "we have made progress in the last year in terms of reforming [LSC] to get it out of the advocacy business." [Id. at 169-170] Mr. Radanovich from California described LSC as "a reckless and irresponsible agency that engages in politically motivated litigation." [Id. at 222]

by its legislation, could refuse to subsidize political expression so long as there were available means to engage in the expression without federal subsidies. Taxation With Representation (TWR) a non-profit corporation was organized under 26 USC 501(c)(3) of the Internal Revenue Code of 1954 ("Code"). Section 170(c)(2) of the Code allowed taxpayers who contributed to 501(c)(3) organizations to deduct the amount of their contributions from their federal income tax. However, 501(c)(3) organizations were not allowed to do extensive lobbying because the government did not want to subsidize that activity with tax deductible funds. TWR claimed that the ban on substantial lobbying by 501(c)(3) organizations was unconstitutional under the First Amendment.

The Court held that Congress had not infringed any First Amendment rights because the ban was not on lobbying, but on the use of public funds with which to do it. Although TWR could not use tax-deductible contributions for lobbying activities, it could use non-tax-deductible contributions for that purpose. This could be accomplished by creating two separate nonprofit organizations, one under 501(c)(3) of the Code contributions to which were tax-deductible and a second under 501(c)(4) to which contributions were not tax deductible.

Here, Congress has taken away the right that was held in *Regan* to save the Code's constitutionality. It has prohibited the setting up of separate entities to engage in political expression with the rule against transfer of non-federal funds.

Appendix C

In *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984), the Supreme Court held that a federal statute was unconstitutional because it banned public television stations receiving federal funds from the Corporation for Public Broadcasting (CPB) from using their non-federal funds for editorializing, a restriction "specifically directed at a form of speech — namely the expression of editorial opinion — that lies at the heart of First Amendment protection." [*Id.* at 381]

In *League of Women Voters*, the law was invalidated because it did not permit federal funds to be segregated from the station's non-federal funds, and the result was that the ban reached beyond the program the government was funding to essentially "gag" the recipient station from engaging in constitutionally protected speech outside the subsidized program. Because the CPB grant consisted of only 1% of the station's total revenue, the station "[was] not able to segregate its activities according to the source of its funding. . . . [A]nd, more importantly, it [was] barred from using even wholly private funds to finance its editorial activity." [*Id.* at 400]

The Supreme Court held that if noncommercial educational broadcasting stations were permitted "to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds," *id.*, then the federal ban would be valid under the reasoning of *Taxation With Representation*:

> Under such a statute, public broadcasting stations would be free, in the same way that the charitable

> organization in *Taxation With Representation* was free, to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities. [*Id.*]

In *Rust v. Sullivan*, 500 US 173, 197-198, the Supreme Court explained why it upheld restrictions on federal funding in *Regan* and struck them down in *FCC*:

> [O]ur "unconstitutional conditions" cases involve situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program. . . .
>
> . . . The condition that federal funds will be used only to further the purposes of a grant does not violate constitutional rights. . . .
>
> By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in League of Women Voters and Regan, not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X

project in order to insure the integrity of the federally funded program.

The same principles apply to petitioners' claim that the regulations abridge the free speech rights of the grantee's staff. Individuals who are voluntarily employed for a Title X project must perform their duties in accordance with the regulation's restrictions on abortion counseling and referral. The employees remain free, however, to pursue abortion-related activities when they are not acting under the auspices of the Title X project.

FCC, *Regan* and *Rust* illustrate that Congress's behavior is not unconstitutional when it is aimed at limiting the specific activity or project it is funding. However, Congress is acting unconstitutionally when it attempts to control a recipient of its largesse when the recipient is engaged in constitutionally protected behavior and is neither engaged in the funded project, nor using federal funds.

The Acts and the Rules, like the inability to segregate funds in FCC, take away the right to engage in the prohibited activity outside of the federally funded program on pain of losing the grant. Congress has prohibited the creation of segregated entities or affiliates financed by a recipient's non-federal funds.

The Congressional intent to accomplish this result is apparent from the legislative history of the 1997 Act.

Appendix C

Mr. Burton of Indiana made the following speech:

> Congress prohibited Legal Services Corporation from doing certain things. Legal Services grantees are getting around these restrictions by forming new shell organizations to accept Federal grants so that the original groups can continue to pursue their liberal agenda with private funds. For example, the Philadelphia Legal Assistance Center and the Legal Aid Society of Santa Clara, in many cases the two organizations have the same board of directors, many of the same lawyers, and they share office space. They are two separate organizations in name only. They are just getting around the restrictions so they can do whatever they damn well please. [Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1997, 142 Cong. Rec. H8149-04, 1996 WL 410589, p. 144]

Representative Dornan from California made the following comment:

> Congress and past administrations have already attempted without success to place restrictions on LSC activities and behavior. Because money is fundible in the hands of private groups that have more than one funding source, LSC and its grantees have cleverly avoided these restrictions. . . . [Id. at 183]

Under the precedents of *League of Women Voters*, and *Button*, the Acts and the Rules are unconstitutional, as they

do not allow LSE to proceed with a class action, a constitutionally protected activity, even when using segregated or transferred non-federal funds.

The Acts and the Rules threaten our most cherished American First Amendment freedoms: freedom of association, freedom of speech and freedom to petition the government for redress of grievances. The rhetoric of budget reform is being used to thinly disguise an attack on basic freedoms. The restrictions could effectively bar LSE attorneys, their clients, their private and State donors, and those to whom LSE wishes to donate its non-federal funds from exercising their constitutionally protected right to freedom of association. That Congress may not do this has been explicitly stated in a long line of Supreme Court precedents that derived from attacks on desegregation and unions. At bottom, the legislation weakens the ability of poor people to stand up for their legal rights and to have an impact, when it may be their only effective method to petition the government for redress of grievances.

Accordingly, it is

ORDERED that the motion to withdraw is denied; and it is further

ORDERED that the Court declares that Pub.L. 104-134, 110 Stat. 1321, secs. 504(a)(7) and 504(d)(1), as reenacted by Pub. L. 104-208, 110 Stat. 3009, and 45 CFR parts 1610.3, 1610.7(a) and 1610.7(b), 1617.1 and 1617.3 are constitutionally invalid under the First Amendment to the United States Constitution.

Appendix C

This constitutes the decision and order of the court.

Dated: December 24, 1996

s/ Beverly S. Cohen
J.S.C.